INDEX

CASES AND OPINIONS: Page

Washington Public Power Supply System v. F.P.C., 358 F. 2d 840 (D. C. Cir., 1966); Appendix A.... 2a

Opinion and Order Granting License, Pacific Northwest Power Co., Project No. 2243, and Washington Public Power Supply System, Project No. 2273; Opinion No. 418, February 5, 1964, 31 FPC 247; Appendix B 17a

Chairman Swidler *dissenting* 100a

Commissioner Black *dissenting* 128a

Opinion and Order on Rehearing and Denying Motions for Stay and to Strike, Pacific Northwest Power Co., Project No. 2243, and Washington Public Power Supply System, Project No. 2273; Opinion No. 418-A, April 30, 1964, 31 FPC 1051; Appendix C 129a

Commissioner Black *dissenting* 148a

Notice of Application for Preliminary Permit, Pacific Northwest Power Co., Project No. 2173, December 16, 1954; Appendix D 152a

Order Issuing Preliminary Permit, Pacific Northwest Power Co., Project No. 2173; April 18, 1955, 14 FPC 644; Appendix E 153a

Terms and Conditions of Preliminary Permit, Form P-1, Articles 1 through 8, 16 FPC 1303 (1956); Appendix F 159a

STATUTES AND REGULATIONS:

Relevant Sections of the Federal Water Power Act, Approved June 10, 1920 (41 Stat. 1063, as amended, 16 U.S.C. §§ 791-823); Appendix G 164a

Regulations Under the Federal Power Act (Title 18, Code of Federal Regulations) as of May 24, 1966; Appendix H 169a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, a Municipal Corporation, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

of

Washington Public Power Supply System

CASES AND OPINIONS.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,728

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT,
PACIFIC NORTHWEST POWER COMPANY,
IDAHO WILDLIFE FEDERATION,
IDAHO PUBLIC UTILITIES COMMISSION,
IDAHO FISH AND GAME COMMISSION,
WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., et al.,
STATE OF OREGON, et al.,
INTERVENORS.

No. 18,729

DEPARTMENT OF CONSERVATION,
STATE OF WASHINGTON, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT,
PACIFIC NORTHWEST POWER COMPANY,
IDAHO WILDLIFE FEDERATION,
IDAHO PUBLIC UTILITIES COMMISSION,
IDAHO FISH AND GAME COMMISSION,
WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., et al.,
STATE OF OREGON, et al.,
INTERVENORS.

No. 18,731

UNITED STATES OF AMERICA ON THE RELATION OF STEWART L. UDALL, Secretary of the Interior,
PETITIONER,

v.

FEDERAL POWER COMISSION, RESPONDENT,

PACIFIC NORTHWEST POWER COMPANY,

IDAHO WILDLIFE FEDERATION,

IDAHO PUBLIC UTILITIES COMMISSION,

IDAHO FISH AND GAME COMMISSION,

WASHINGTON STATE SPORTSMEN'S COUNCIL, INC., et al.,

STATE OF OREGON, et al.,

INTERVENORS.

Petitions to Review Orders of the Federal Power Commission

Decided March 24, 1966†

* * * * *

[Appearances omitted.]

* * * * *

Before WILBUR K. MILLER, *Senior Circuit Judge*, and DANAHER and BURGER, *Circuit Judges*.

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† 358 F.2d 840 (D.C. Cir., 1966).

WILBUR K. MILLER, *Senior Circuit Judge:*

Nos. 18,728 and 18,729

On June 26, 1964, Washington Public Power Supply System[1] and the Department of Conservation of the State of Washington filed with us separate petitions for review of an order of the Federal Power Commission dated February 5, 1964, and an amendatory order dated April 30, 1964. For reasons set forth in the Commission's opinions, these orders, taken together, granted to Pacific Northwest Power Company, a privately owned corporation, and denied to the Power Supply System, a license to construct a hydroelectric project at the High Mountain Sheep dam site on the Snake River between Oregon and Idaho.

Both petitioners contended before the Commission, and contend here, that the Power Supply System, a municipality which on April 24, 1961, had applied for a license for a High Mountain Sheep project at the same site as that previously proposed by Pacific Northwest, was entitled to preference over Pacific Northwest under Section 7(a) of the Act, 16 U.S.C. § 800(a), which is in pertinent part as follows:

> "In issuing . . . licenses where no preliminary permit has been issued . . . the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . ."

---

[1] The System is a joint operating agency composed of sixteen public utility districts of the State of Washington, organized to construct, acquire and operate facilities for the generation and transmission of electricity. It is a municipality within the meaning of Sections 3(7) and 7(a) of the Federal Power Act, 41 STAT. 1064, 1067, 16 U.S.C. §§ 796(7) and 800(a).

This statutory provision undoubtedly gave the Public Power System preference over Pacific Northwest (provided its application met all requirements) if no preliminary permit had been issued.

Pacific Northwest insists that a preliminary permit had been issued to it, and was extant when it applied for the High Mountain Sheep license. On the other hand, the petitioners argue that Pacific Northwest's preliminary permit was limited to the Mountain Sheep and Pleasant Valley dam sites described in it and did not cover the High Mountain Sheep site. They further assert that Pacific Northwest's preliminary permit was terminated when the Commission declined to issue a license covering the sites therein described. Thus, the controlling question before us is whether, in fact and in law, a preliminary permit covering the High Mountain Sheep site had been issued and was still valid when the Power Supply System applied for a license covering the same site. In other words, does the priority afforded by a preliminary permit apply only to a project for waterway development on the exact site described in the permit, or does it include a project on a different site for developing essentially the same portion of the waterway, which is determined to be best adapted to comprehensive development of that waterway?

The proceedings began on November 9, 1954, when Pacific Northwest filed with the Commission an application for a preliminary permit for a Mountain Sheep-Pleasant Valley project on the Snake River, which it described as two low dams on sites above the point where the Imnaha River empties into the Snake. The sites were 21 miles apart, the lower being only 3.7 miles above the High Mountain Sheep site now in controversy. The Commission issued a preliminary permit to Pacific Northwest April 8, 1955, to expire March 31, 1958. It designated the project as No. 2173 and described it as it had been described in the application.

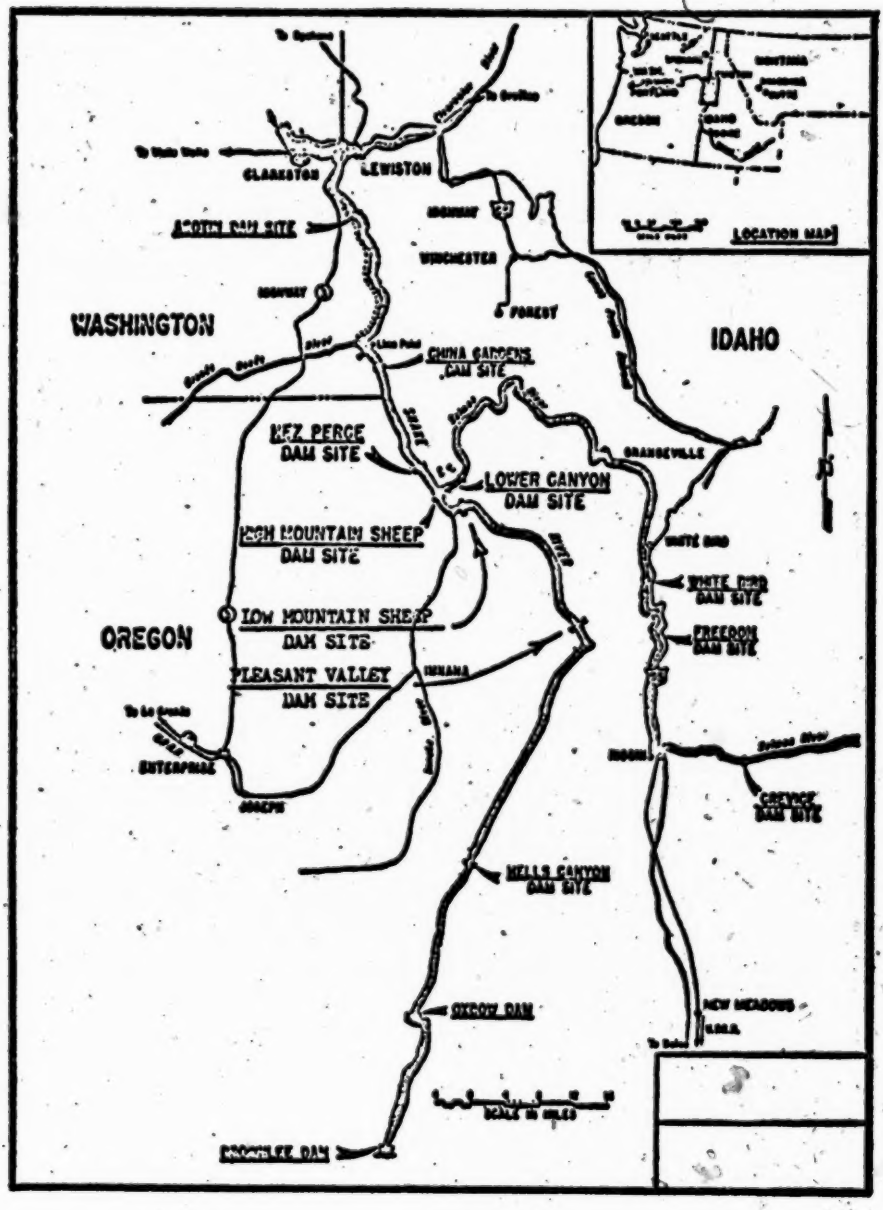
On September 7, 1955, Pacific Northwest applied to the Commission for a license on the Mountain Sheep-Pleasant Valley project No. 2173, describing it in the terms used in the permit application and the preliminary permit. After a hearing, the Commission denied the application on January 28, 1958, on the ground that the plan proposed was not that best adapted to the development of the middle Snake River. It said:

> "It is readily apparent from the studies presented in House Document 531, in Senate Document No. 51, and from those prepared by the Staff for the Middle Snake Basin that any combination of projects which includes Nez Perce is consistently superior to any combination of projects which does not include Nez Perce."

On March 31, 1958, the last day of its preliminary permit, Pacific Northwest filed an application for a license for the High Mountain Sheep project, which was docketed as No. 2243. The project was described as a single high dam at the High Mountain Sheep site instead of the two low dams originally contemplated at the Mountain Sheep and Pleasant Valley sites. Nearly two years later, on March 15, 1960, the Power Supply System applied to the Commission for a Nez Perce project, designated as No. 2273. That site is below the mouth of the Salmon River and about three miles downstream from the High Mountain Sheep site.

We here reproduce a sketch of the reach of the Snake River involved in these cases, showing its tributaries and the various dam sites mentioned in this opinion.

The Commission consolidated the application of Pacific Northwest for the High Mountain Sheep site with that of the Power Supply System for the Nez Perce location and a hearing on the two applications was conducted by an


CLARKSTON
LEWISTON
WINCHESTER
WASHINGTON
IDAHO
CHINA GARDENS DAM SITE
NEZ PERCE DAM SITE
LOWER CANYON DAM SITE
HIGH MOUNTAIN SHEEP DAM SITE
LOW MOUNTAIN SHEEP DAM SITE
OREGON
PLEASANT VALLEY DAM SITE
ENTERPRISE
JOSEPH
GRANGEVILLE
WHITE BIRD DAM SITE
FREEDOM DAM SITE
CRAVICE DAM SITE
HELLS CANYON DAM SITE
OXBOW DAM
NEW MEADOWS
HOOVER DAM
LOCATION MAP

examiner.[2] Before a determination had been made by him, the Power Supply System on April 24, 1961, moved to amend its Nez Perce license application and proposed as an alternative that, if the Commission no longer regarded the Nez Perce site as best adapted to comprehensive development of the Snake River, it should be licensed to construct a High Mountain Sheep project on the site proposed by Pacific Northwest more than three years before.

On February 5, 1964, the Commission departed from its earlier dictum about the Nez Perce site and found that the High Mountain Sheep site was best adapted to a comprehensive plan for developing the Snake and Salmon Rivers because its location above the mouth of the Salmon eliminated the adverse effect on runs of anadromous fish in the Salmon River which probably would be caused by a Nez Perce dam below the Salmon's mouth. As to the conflicting applications, the Commission sustained its examiner's holding that the Power Supply System's application for a license for the High Mountain Sheep site was not entitled to preference, under Section 7(a) of the Act, over the earlier application of Pacific Northwest because the preference applies only where no preliminary permit has been issued.[3]

The legal question whether Pacific Northwest's preliminary permit was limited to the particular sites proposed in its application therefor, or was broad enough to cover the project on another site which was found by the Commission to be best adapted to a comprehensive development of that reach of the Snake River, was answered by the Commission in its opinion. It refused to adopt the

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[2] The Secretary of the Interior intervened and asserted, *inter alia*, that a dam at the Nez Perce site, which is downstream from the mouth of the Salmon River, would interfere unduly with runs of anadromous fish up that stream.

[3] It held that the preliminary permit issued to Pacific Northwest for Project 2173 entitled that company to preference under Section 5 of the Act, 16 U.S.C. § 798, with respect to the High Mountain Sheep site.

narrow conception of a preliminary permit contended for by our petitioners, and, as we have said, held that Pacific Northwest's permit gave it priority with respect to the High Mountain Sheep site.

In doing so, the Commission said, in part:

> "A preliminary permit is issued under Section 4(f) of the Act to enable an applicant for a license to make studies and gather data and at the same time under Section 5 to maintain its priority of application. Section 4(f) specifically states that the permits are to enable applicants to secure the data and perform the acts required by Section 9. The latter requires that each applicant submit to the Commission 'maps, plans, specifications and estimates of cost as may be required for a full understanding of the proposed project.' Section 5 refers to the permit as being for the sole purpose of maintaining priority for a period, not exceeding three years, 'for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.' The statute limits the purpose of the permit to priority to avoid any interpretation that it represents permission to begin construction. The statute does not prevent but clearly contemplates that proposals and plans made at the time the permit was issued may be changed as a result of investigations made by the permittee. At the same time the permittee is protected by the permit from rival applicants while incurring expenses in the investigation of a project intended and required by Section 10(a), to be best adapted to a comprehensive development of the reach of the river involved.
>
> "We consider it evident that the statutory intent of these provisions is to give a permittee the first rights to develop that reach of a river to which the permit relates. Any other interpretation would make the permit meaningless, for if another party could obtain a permit or apply for a license for a nearby

project that would develop substantially the same head as the one described in the original permit, there would be no protection to the first permittee. . . ."

The Commission also said in discussing the question:

"To interpret the priority afforded by a permit as limited to a single project would also be contrary to the two most significant objectives of the Act, namely, to encourage the development of our nation's water resources, and to insure that such development would be best adapted to the fullest use of the river, considering all uses. Who would be willing to undertake substantial and expensive investigations looking toward development of a river if a permit were good only in the event—the unlikely event—that the results of the investigations coincided precisely with the permittee's guesstimate at the time the permit application was filed? In this connection, it is the experience of the Commission that a project is rarely constructed at the same exact site and in the same fashion as originally contemplated. Indeed, we are unaware of a single instance where this is true. . . ."

Where an administrative agency must and does initially determine the specific application of a statutory provision, as the Commission has done in these cases, the reviewing court's function is limited to deciding whether the administrative interpretation has " 'warrant in the record' and a reasonable basis in law." *Labor Board* v. *Hearst Publications,* 322 U.S. 111, 131 (1944); *California Company* v. *Udall,* 111 U.S. App. D. C. 262, 296 F. (2d) 384 (1961). See also in *I.C.C.* v. *J-T Transport,* 368 U.S. 81 (1961), Mr. Justice Frankfurter's dissent, which was joined by Mr. Justice Harlan and Mr. Justice Stewart. In the dissent, at page 127, it was said:

"Administrative agencies are not only vested with discretion in sifting evidence and in making findings but may also draw on their specialized competence for

ascertaining the reach and meaning of statutory language. Compare *Social Security Board* v. *Nierotko*, 327 U.S. 358, 368-371, with *Labor Board* v. *Hearst Publications*, 322 U.S. 111, 128-131. The factors to be considered on judicial review of such an administrative determination include the precision of the statutory language, the technical complexity of the relevant issues, the need for certainty as against experimentation, and the likelihood that Congress foresaw the precise question at issue and desired to express a foreclosing judgment on it. . . ."

This was not contradicted by the majority opinion, and we regard it as an apt, and because of its source a cogent, statement of the principle contained in it.

We hold that, measured by the guidelines of these cases, the Commission had the authority and the duty to interpret the priority provision in the first instance, and its interpretation should be affirmed unless it is unreasonable as a matter of law or clearly contrary to congressional policy. That the Commission's priority determination does not offend in these respects is apparent, we think, from an examination of pertinent provisions of the Federal Power Act.

Section 4(e) of the Act, 16 U.S.C. § 797(e), authorizes and empowers the Commission to issue licenses

". . . for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States . . . ."

Realizing that in many instances applications for such licenses cannot be prepared in final form without prior investigation of available sites, which may be and often is costly and time-consuming, Congress also authorized and empowered the Commission in Section 4(f) of the Act, 16 U.S.C. § 797(f), to issue preliminary permits for the purpose of enabling applicants to secure the data and perform the acts required by Section 9, 16 U.S.C. § 802: such maps, plans, specifications and estimates of cost as may be required for a full understanding of the proposed project; and satisfactory evidence of compliance with the applicable laws of any state involved.

Section 5 of the Act, 16 U.S.C. § 798, provides that each such preliminary permit

> "... shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing."

Section 10(a) of the Act, 16 U.S.C. § 803(a), requires that all licenses shall be on condition

> "[t]hat the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interestate [*sic*] or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational

purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Obviously, the purpose of Sections 4(b) and 5 is to afford protection to the entrepreneur willing to invest his time and money in determining exactly where and in what form to propose construction of a project which will be best adapted to a comprehensive plan for improving or developing a waterway and the improvement and utilization of water-power development. It would be manifestly unfair to one who has expended large sums of money over a long period of time in the necessary investigation if, upon completion and subsequent application for a license, a state or municipality could step in and reap the fruit of his labors by obtaining a license for the site so laboriously determined upon, merely because of the preference granted by Section 7(a). It was to prevent such unfairness that Congress provided for preliminary permits which would maintain priority, and also provided that the preference granted to public bodies by Section 7(a) should not prevail over them.

The petitioners' primary position that Pacific Northwest's preliminary permit which described two low dams in the Mountain Sheep-Pleasant Valley project was limited to exactly that project is almost tantamount to a contention that a preliminary permit is substantially equivalent to a license, that is to say, that a license can be granted only for the project described in the permit. In so contending, the petitioners ignore the command of Section 10(a) that the project as finally approved and adopted "shall be such as *in the judgment of the Commission* will be best adapted to a comprehensive plan for improving or developing a waterway . . . [and] for the improvement and utilization of water-power development . . . ." (Emphasis added.) Obviously, the Commission is charged with implementing the policies of the Act. It is entitled to such flexibility as will conform to the statutory objectives. The

Supreme Court has pointed out as much in *Civil Aero. Bd.* v. *State Airlines*, 338 U.S. 572, 577-578 (1950). See also *Federal Com. Comm'n* v. *Broadcasting Co.*, 309 U.S. 134, 142-143 (1940).

It is further contended by the petitioners that the Commission's denial of Pacific Northwest's application for a license for the Mountain Sheep-Pleasant Valley dam sites terminated its preliminary permit as of the date of the denial January 28, 1958. We reject the contention. Under Section 5 of the Act, the Commission may cancel a preliminary permit "upon failure of permittees to comply with the conditions thereof or for other good cause shown *after notice and opportunity for hearing.*" (Emphasis added.) The Commission did not order cancellation of Pacific Northwest's preliminary permit when the Mountain Sheep-Pleasant Valley license application was denied but, as its subsequent actions showed, regarded the permit as thereafter in full vigor.

Moreover, the finality of the project description in the preliminary permit, which is the nub of petitioners' argument, is negated not only by the fact that the Commission's primary concern is in the development of waterways and water-power, as Congress directed in Section 10(a), but also by that section's concluding clause, which shows that the projects to achieve that development are not confined to those first suggested by an applicant:

> ". . . [A]nd if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

We hold therefore that the Commission's action here is not unreasonable as a matter of law and not clearly contrary to congressional policy but, on the contrary, was authorized by its governing statute. The orders under review will be upheld.

Affirmed.

No. 18,731

The Secretary of the Interior's petition for review of the same two orders of the Federal Power Commission challenges the action of the Commission in refusing to recommend that the High Mountain Sheep project be constructed and operated by the United States.

He asserts (a) that Congress has preempted the High Mountain Sheep site "in its comprehensive plan for regulating the flow of the waters of the Columbia River system;" and (b) that the Federal Power Act forbids the Commission to license for private development a project that will affect existing or planned federal development of water resources. The Secretary of the Interior also asserts (c) that "the Commission erred in failing to require an independent staff study and to permit the Secretary to offer evidence respecting federal development."

With respect to the Secretary's assertion (a), referred to in the preceding paragraph of this opinion, we need do no more than cite the *Roanoke Rapids* case,[4] in which the Supreme Court rejected a similar argument. Section 7(b) of the Act, 16 U.S.C. § 800(b) commits solely to the Commission the task of deciding whether the development of any water resources for public purposes should be undertaken by the United States itself. Unless the Commission's action is arbitrary—without basis in the record—we have no power to disturb it. We think in this case the Commission was amply justified in refusing to recommend federal development and in issuing a license for private construction.

The Secretary's broad assertion (b), outlined above, cannot be sustained. It would, if literally accepted, mean that the existence of one federal dam in a waterway would require that any future dams therein be federally constructed.

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[4] United States *ex rel.* Chapman v. Federal Power Comm'n, 345 U.S. 153 (1953).

Manifestly, there is no such requirement: the Snake River itself is already developed by a mixture of federal and non-federal projects. If the Commission had found that private development of the project would have a significant adverse effect on existing or planned federal projects, it might justifiably have recommended, under Section 7(b),[5] that federal construction be undertaken, even though Congress has not pre-empted the site. There is no such finding here, however, and we find nothing in the record to justify that conclusion.

The Secretary's assertion (c), summarized above, is rejected. Suffice it to say that his long delay in opposing the grant to Pacific Northwest—the hearing had been concluded for over a year and the examiner's decision had already been rendered when the Secretary finally moved to intervene—was sufficient to warrant denial of his motion.[6] Nevertheless, the Commission permitted intervention limited to the filing of exceptions to the examiner's decision and participation in oral argument before it. Various communications from the Secretary were admitted in evidence. In these circumstances, we think the Secretary has no cause to complain that he was not permitted to introduce evidence which he has not proffered or described.

Affirmed.

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[5] 16 U.S.C. § 800(b):

"(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development."

[6] The Secretary of the Interior was more than once specifically invited to participate in the proceedings, but for a period of about two years did nothing.

APPENDIX B

FEDERAL POWER COMMISSION

Opinion No. 418†

PACIFIC NORTHWEST POWER COMPANY, PROJECT No. 2243; WASHINGTON PUBLIC POWER SUPPLY SYSTEM, PROJECT No. 2273

Opinion and Order Granting License

(Issued February 5, 1964)*

* * * * *

[Syllabus and Appearances omitted.]

* * * * *

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Harold C. Woodward, and David S. Black.

Ross, *Commissioner:*

This is a proceeding under Part I of the Federal Power Act involving applications by Pacific Northwest Power Company (PNPC) and the Washington Public Power Supply System (WPPSS) for a license to build a hydroelectric project on the Snake River at the confluence of the Salmon River on the Idaho-Oregon border. PNPC proposes to build a project at the High Mountain Sheep (HMS) dam site above the Salmon, and WPPSS proposes to build a

† 31 FPC 247 (1964). This opinion is also printed at II Joint Appendix, p. 609, Washington Public Power Supply System v. FPC, 358 F. 2d 840 (D.C. Cir. 1966).

* Initial decision appears on p. 305. Rehearing for purposes of reconsideration granted April 3, 1964, 31 FPC 773. Modified; rehearing and stay denied by Opinion No. 418-A, issued April 30, 1964, 31 FPC 1051. [The initial decision referred to is the examiner's decision. It is not printed herein. The opinion on rehearing is printed in Appendix C, p. 129a, *infra.*]

project at the Nez Perce dam site just below the Salmon, and alternatively, an HMS project.[1] The Secretary of the Interior, Intervener, urges that both applications be denied and federal construction be recommended. The proceeding is before the Commission upon exceptions[2] to the examiner's decision issued October 8, 1962, recommending a license to PNPC for the HMS project.

PNPC is an Oregon corporation qualified to do business in Oregon, Idaho, Washington, and Montana. It is a wholly owned subsidiary of four sponsoring companies, The Montana Power Company, Pacific Power and Light Company, Portland General Electric Company, and the Washington Water Power Company and was formed in April of 1954 for the purpose of providing a supplemental source of power to meet the future requirements of these companies. It does not itself own or operate any electric facilities.

WPPSS was created, as a joint operating agency, composed of 16 public utility districts of the State of Washington, pursuant to an order of the Department of Conservation and Development of the State of Washington dated January 31, 1957, and, under the laws of the State of Washington, is a municipal corporation. It was established for the purpose of acquiring, constructing, and operating electric generating and transmission facilities. It does not own or operate any electric facilities.

The history of these proceedings began April 8, 1955, when PNPC was granted a preliminary permit effective April 1, 1955, for a period of three years for Project No. 2173 consisting of the Mountain Sheep Development at

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[1] See Map, Appendix A. [The map referred to in this footnote, printed in the Commission's Appendix A, is omitted. It is identical to the map used by the Court of Appeals in its decision, except that the Commission did not locate the sites of the Low Mountain Sheep and Pleasant Valley Dams. See map in Court of Appeals decision, p. 7a, *supra*.]

[2] Filed by Idaho Fish and Game Commission, Oregon State Game Commission and Fish Commission of Oregon, WPPSS, PNPC, staff of this Commission, and the Secretary of the Interior.

river mile 192.6 and the Pleasant Valley Development at river mile 213.2 both on the Snake River above the confluence of the Salmon and the Imnaha thereby limiting to the greatest extent possible impact on the Columbia River salmon runs (14 FPC 644). PNPC filed an application for a license for this project on September 7, 1955, but the license was denied by the Commission on the ground that any combination of projects which included Nez Perce was consistently superior to any combination of projects which did not include Nez Perce (19 FPC 127, 131).

Thereafter PNPC filed an application for rehearing and stay of the Commission's order in which it asked for time and opportunity to determine what modifications of the project would accord to the determination of the Commission as the best comprehensive development of the resources involved. On March 20, 1958, just prior to the expiration of the three-year permit on March 30, the Commission issued an order denying rehearing and stay with the notation that an opinion and order would be issued later. It was in this situation that PNPC filed its application for a license for the High Mountain Sheep Development, identified as Project No. 2243, located between the confluences of the Salmon and the Imnaha at river mile 189.2 on the Snake. The filing was thus made within the three-year period specified in the permit. It was not until April 11, 1958 (19 FPC 353) that the Commission issued its opinion and order on rehearing in which it generally reaffirmed its decision on the superiority of Nez Perce over the applicant's Mountain Sheep-Pleasant Valley project.

On June 27, 1958, PNPC filed a petition requesting a declaratory judgment that the preliminary permit issued April 8, 1955, continued in force and effect, that the application for license in Project No. 2243 was filed in accordance with the preliminary permit, and that the preliminary permit maintained priority of application. This petition was withdrawn on September 28, 1959, with the explanation that the purpose for which the petition was filed was moot.

On March 15, 1960, WPPSS filed its application for the Nez Perce Project at river mile 186.2. Hearings were held in Washington and at Portland, Oregon from November 4, 1960, intermittently to September 12, 1961. On April 24, 1961, WPPSS filed a motion for leave to file an amendment to its Nez Perce application to construct an alternate HMS project. This motion was denied by the examiner, who was affirmed by the Commission on the ground that no good reason had been shown for the amendment at that stage (25 FPC 1004; 26 FPC 174). WPPSS, however, did introduce evidence on an alternative HMS project on rebuttal and at the end of the hearing moved to amend its application to include HMS. After the filing of voluminous briefs the examiner issued his decision October 8, 1962. He denied WPPSS's motion to amend and granted a license for PNPC's HMS project. Exceptions were filed to the examiner's decision as noted above including those by the Secretary of the Interior, who by order of December 14, 1962, was permitted to intervene out-of-time.

Evidence was submitted by the parties with respect to the three principal projects proposed: PNPC's proposal for the HMS site and WPPSS's proposals for both Nez Perce and HMS. All three projects would involve large concrete arched dams, reservoirs extending up the Snake River, and also up the Salmon River in the case of Nez Perce, and powerhouses containing turbines and generators. The evidence included detailed data on these proposals with a number of variations. Evidence was also submitted setting forth plans for a comprehensive development of the Snake River including these projects. For instance, plans of comprehensive development involving HMS also include a dam known as the Lower Canyon Project, on the Salmon River. Further details of the proposed projects and proposed plans of development will be discussed below. There is also evidence submitted on the need for additional power resources by the Pacific Northwest area and by the respective applicants. The evidence of regional resources

took into account not only facilities in operation at the time the record was made, but also the effect of certain projects to be installed in the future including those to be built under the proposed treaty with Canada. We are also taking notice that since the close of the record additional projects have been scheduled including the Hanford atomic reactor which will supply power to WPPSS and private companies. On the basis of the evidence and the discussion below, we find that the HMS project is best adapted within the meaning of Section 10(a) of the Federal Power Act to a comprehensive plan for improving and developing a waterway, that PNPC should be given a license for the HMS project and that federal development should not be recommended.

THE PROPOSED PROJECTS AND PLANS OF DEVELOPMENT

An important preliminary question is whether a license should be granted for a project at the Nez Perce site or at the HMS site. This involves a consideration of the potentialities of each, including its adaptability to a comprehensive plan for improving the Snake and Salmon Rivers. While both PNPC and WPPSS submitted proposals for building a project at the HMS site, the physical differences between their proposals, as will be developed, are not so great as to make any appreciable difference in choosing between Nez Perce and HMS.

For the reasons set out below, we find that the HMS project and plan is preferable to the Nez Perce project and plan. The decisive difference between the two projects and their related plans is in their effect on the fish problem. The Nez Perce project would adversely affect the fish runs on the upper Snake, the Salmon and the Imnaha Rivers while the HMS project would not affect in any manner the fish runs on the Salmon River and its only considered impact would be on the fish runs on the Upper Snake where these runs are already impaired. In addi-

tion, the HMS project would undoubtedly have some impact on the smaller run on the Imnaha River. However, a canal proposed by PNPC as part of the HMS project would appear to have a substantial chance of continuing the existing fish runs.

The Nez Perce and HMS Snake River dam sites represent two of the most important remaining sites on the Columbia River system. As the attached map (App. A)† shows, the Snake at the dam sites flows in a northwesterly direction between the states of Oregon and Idaho; the Salmon flows in from Idaho on the east side of the Snake. The Nez Perce site is at river mile 186.2 about 2.5 miles below the mouth of the Salmon, while the HMS site is at river mile 189.2 about eight-tenths of a mile upstream from the Salmon, but below the mouth of the Imnaha, which flows into the Snake from the west or Oregon side.

A. *Comparison of the Proposed HMS and Nez Perce Projects*

As proposed by PNPC the HMS project would consist of a concrete arch dam approximately 670 feet high from the river bed and would create a reservoir extending approximately 58 miles upstream on the Snake to the Hells Canyon dam site tailwater and 10 miles upstream on the Imnaha. The reservoir would have a gross storage of 3,600,000 acre-feet, of which 2,250,000 acre-feet would be usable with a normal drawdown. Two outdoor-type power houses would be located one on each side of the river near the base of the dam. Each turbine would be connected to a generator rated 175,000 kw. There would be five units initially with a total installed capacity of 875,000 kw.[3] Ultimately there would be ten units with a total installed capacity of 1,750,000 kw. Initial capability would be

[3] Seven units were assumed for the purpose of company plans of comprehensive development.

† The Commission's Appendix A is omitted. See map in Court of Appeals decision, p. 7a, *supra*.

1,000,000 kilowatts, and ultimate capability would be 2,000,000 kw.

The HMS project proposed by WPPSS would also consist of an arch dam at the same site and a reservoir with the same capacity. In a number of respects, not necessary to relate here in full, engineering details of construction would differ from the project proposed by PNPC. For instance, an indoor-type powerhouse would be located on the Idaho side of the river near the base of the dam with an initial installation of six generating units, each rated 200,000 kw. Provision would be made to house four similar units in a future underground powerhouse on the Oregon side. Maximum initial capacity would be 1,200,000 kw and ultimate capacity would be 2,000,000 kw.

As proposed by WPPSS in its application as amended in later testimony the Nez Perce project would consist of a concrete arch dam approximately 715 feet high. It would create a reservoir extending approximately 63 miles upstream on the Salmon, 61 miles upstream on the Snake to the Hells Canyon site tailwater and 10 miles upstream on the Imnaha. The reservoir would have a gross storage capacity of 6,600,000 acre-feet and usable storage of 3,130,000 acre-feet with a normal draw down. An underground powerhouse requiring an excavation would be located on the Oregon side of the river and would house the ten initial generating units rated 200,000 kw each or 2,000,000 kw in all. WPPSS plans another underground powerhouse for the Idaho side of the river, which would have six more units, so that the total generating capacity of the project would be 3,200,000 kw.

(1) *Safety and stability of the dam sites and structures.*— The parties have raised an issue as to the adequacy of the proposed sites for both of the proposed dams (as well as the Lower Canyon dam which is eventually to be part of an HMS plan, see pp. 9-10, *infra.*), but particularly with respect to Nez Perce. The difficulty is geological. The

rocks of the area consist of the Columbia River basalts overlying what is known as the Seven Devils formation, consisting of strong metamorphosed volcanic and sedimentary rocks. As the Snake River cut down through these rocks, it permitted lateral stresses to cause complicated fracturing of the rocks. At the Nez Perce site, according to the evidence, the possibility exists that on the left side of the site looking downstream large blocks of rock might slide along a sloping fault plane, but there is also evidence indicating that this would probably not occur because of certain other blocks of rock standing in the way and because the apparent faults might actually be welded by metamorphism.[4] Evidence also indicates doubt about the Lower Canyon site at mile 3.7 on the Salmon River, and the evidence is not sufficient to remove all doubt with respect to the HMS site. What is needed before construction can be authorized at any of these sites is a complete geological study carried out by a more elaborate program of borings. It will be necessary to provide, as recommended by our staff, that the licensee of any of the above projects shall engage qualified independent experts to report on the dam site and the proposed design of the dam before we approve the design drawings for the dam structure. But we do not believe that the evidence supports a finding that any of the sites are inherently unsafe or which would warrant a preference between Nez Perce and HMS on this basis. Specifically we agree with the examiner that the project structures proposed by PNPC and WPPSS for the HMS project can, subject to approval of final plans, be made safe and stable, but final design should be subject to further tests and to our approval as ordered below.

(2) *Costs and power benefits*—Although the record is burdened with conflicting estimates of costs for the HMS

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[4] The change in structure of a rock as a result of heat, pressure or water.

and Nez Perce projects on various assumptions, it is clear enough as noted by the examiner, that both the HMS project, as proposed for construction by either PNPC or WPPSS, and the Nez Perce project proposed by WPPSS are economically feasible. Furthermore the record makes clear that Nez Perce, which is the most costly project and, at the same time, produces the most power, shows the greatest excess of annual power values over cost.

WPPSS shows a project cost of $391,080,000 for Nez Perce and $213,000,000 for HMS; PNPC shows a project cost of $185,700,000 for HMS; the staff shows $369,120,000 for Nez Perce, $229,743,000 for WPPSS's version of HMS and $200,231,000 for PNPC's version of HMS.[5] In each case there is an excess of power value over cost—$23,410,000 and $17,482,000 for the WPPSS and FPC analyses of Nez Perce using a cost of money of 4.75 percent and 4.5 percent respectively; $16,792,000 and $12,209,000 for the WPPSS and FPC analyses of HMS using WPPSS financing with a 4.5 percent cost of money; and $5,788,000 and $4,267,000 using the PNPC and FPC analyses of HMS using PNPC financing with a cost of money of 6 percent.

Relying on the same project cost comparison evidence, the unit costs of energy to be generated by Nez Perce or the HMS project are not very different when approximately equivalent financing is used. Thus the cost per kwh is 2.7 and 2.5 mills for energy generated at Nez Perce and HMS using WPPSS figures and WPPSS financing, while the cost is 3.4 mills for either project using the staff figures and WPPSS financing. However, when the PNPC 6 percent cost of money is employed the unit cost per kwh for HMS rises to 3.5 mills under the PNPC analysis and to

[5] These cost figures and those to follow relating to the cost of the respective projects reflect WPPSS's revision of figures used by the examiner, for we agree with WPPSS that all cost comparisons should be uniformly computed on the basis for cost and value at site as had been stipulated on the record with respect to comparative plans.

4.2 mills under the staff analysis. The record does not directly show what the unit costs would be for Nez Perce power using PNPC's 6 percent financing.

We conclude from the cost comparison of the projects that Nez Perce is the project with the larger absolute excess of value over cost. However, assuming a common cost of money, the difference between the two projects with respect to the unit cost of the energy generated is not very great, even assuming WPPSS estimates, and non-existent assuming the staff's. PNPC's financing, compared to WPPSS's proposed financing, discussed further at Page 33 below, however, would significantly increase the cost of the power sold to the buyer. This is because PNPC would receive a return that would cover its cost of debt and provide an allowance on its equity capitalization. In addition PNPC would incur Federal income taxes. On the other hand assuming WPPSS could finance with 4.75 or 4.5 percent debt it would be paying less for its capital and would pay no Federal income tax. This, of course, does not mean that Nez Perce is for this reason the better project, but merely that if there were no questions of priority and preference (which, of course, there are) this might be a factor favoring a WPPSS application for Nez Perce over a PNPC application for HMS, even if on the basis of comparable financing HMS was as good or better than Nez Perce. If, however, this kind of advantage were controlling as against a valid priority, we would in almost every case be required to grant the license to a municipal rather than a private applicant for a license. If this were so, the preference provisions in favor of states and municipalities in Section 7(a) of the Act would hardly be necessary, and the priority provisions of Sections 4 and 5 would be meaningless.[6]

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[6] As we understand it, one of the major reasons for the priority and preference provisions of the Act was to remove from Commission discretion the controversial issues as to whether competing public or private applicants could best serve the public.

(3) *Other benefits*—One of the benefits of either HMS or Nez Perce is the ability to store water and so lessen floods on the Columbia River. The initial flood control goal of the United States Corps of Engineers is to limit the flood flow on the Columbia at The Dalles to 800,000 cfs. This would require[7] 17.3 million acre feet of storage while the ultimate goal of a peak flow of 600,000 cfs at The Dalles would require 32.5 million acre feet of storage. The Corps report shows 8.3 million acre-feet existing or under construction. While the construction of Canadian storage[8] would add 8.45 million acre-feet and the Libby Project would add 5 million acre-feet to available storage, thus there still is an authorized use for further storage from a project on the Snake where flood flows, with the Salmon, amount to 6.2 million acre-feet.

The usable storage for flood control at HMS would amount to only 2,250,000 acre-feet compared with 5,015,000 acre-feet at Nez Perce, so that considered only as project versus project the latter would clearly be preferable on this point. As noted below, however, this preference is somewhat diminished in value by the fact that the HMS plan of development would eventually also include 3,265,000 acre-feet of storage for the Lower Canyon development on the Salmon,[9] so that the HMS plan of development would provide usable storage of 5,515,000 acre-feet. The record indicates that either of the rival projects can be operated satisfactorily for flood control.

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[7] Corps of Engineers Report, March 31, 1961, p. 5.

[8] Canadian storage would be available upon the construction of certain projects on the Columbia River in Canada. The treaty between the United States and Canada providing for such storage was ratified by Congress in 1961, but not by the Canadian Parliament. A somewhat different arrangement for sharing the power benefits is now being negotiated.

[9] Assuming this development at mile 3.7 with a reservoir elevation of 1595 feet.

The applicants have a[illegible]n the annual values to be given their storage potentials. As of 1968 the value of the HMS storage is $1,840,000 compared to $5,300,000 for Nez Perce, but the Lower Canyon Project would add the value of $3,500,000 to the HMS plan. If Canadian storage becomes available, the value of HMS, Lower Canyon and Nez Perce storage would decrease to only $240,000, $370,000, and $560,000, respectively.

The record indicates that some of the recreational potentialities of the double Nez Perce reservoir are greater than for—HMS (or even for HMS with Lower Canyon). The large body of water created by the Nez Perce dam would provide greater opportunity for boating, camping, fishing, hunting and sightseeing than the HMS reservoir or the Lower Canyon reservoir, or both. However, these advantages are offset by the fact that the Nez Perce project would threaten recreational values of fishing for salmon and steelhead trout not only at the site of the reservoir but wherever fish originating on the Salmon River watershed may be caught from the headwaters to the ocean.

The record indicates that downstream navigation benefits achieved by controlled release of water would be of equal value with Nez Perce or HMS. The double reservoir of Nez Perce would permit greater scope for boating above the dam, but there is nothing to show that there is any importance in such navigation apart from recreation.

B. *Comparison of the Proposed Plans of Development*

In determining whether to license HMS, Nez Perce, or neither, the Commission must make the required findings under Section 10(a) of the Federal Power Act providing in part as follows:

> That the project adopted • • • shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a

> waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial uses, including recreational purposes; * * *.

To meet the requirements of the statute plans were submitted by WPPSS, PNPC and our staff for the "common reach" of the river,[10] and these parties submitted costs and other data with respect to the plans and variations of them.

The evidence shows two major plans with variations, and they are mutually exclusive. One plan involves the HMS and related projects and the other plan involves Nez Perce, as well as additional projects. While these plans show the potentialities of development of either Nez Perce or HMS, the cost estimates of the parties respecting the same plan differ widely. Furthermore, as already indicated, more exploration is needed at the project sites so that final plans may differ from the estimates submitted herein. For this reason we do not find that the data submitted respecting these plans precisely represents the ultimate development of either plan, but we are satisfied that such estimates are approximately correct and do provide a satisfactory basis for comparing the two plans. We also note, as did the examiner, that there is no immediate proposal for the construction of projects incident to either plan other than the HMS and Nez Perce projects. Under these circumstances we think that the best way of exercising our responsibilities under Section 10(a) is to determine whether a grant of either the Nez Perce or HMS projects at this time would, the important time factor considered, preclude a superior development of the rivers involved.

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[10] Defined at the prehearing conference as extending from the tailwater of the China Gardens project at Snake River mile 172.5, elevation 845 to the normal pool elevation of the Hells Canyon project on the Snake River, elevation 1683 feet m.s.l., and to the normal pool elevation of the future Freedom project on the Salmon River, elevation 1780 feet m.s.l.

The HMS plan consists of the HMS development on the Snake above the mouth of the Salmon, the Lower Canyon development utilizing an even larger head on the Salmon (either at mile 0.5 or 3.7), later possibly the Freedom project at mile 69.2 on the Salmon, and the small China Gardens development on the Snake some sixteen miles below the mouth of the Salmon. The Nez Perce plan consists of the large Nez Perce development on the Snake just below the mouth of the Salmon and the China Gardens development further down the river, either with or without the Freedom development and the Whitebird development, a combination fish trap and generating facility at the head of the Nez Perce reservoir on the Salmon River.[11]

PNPC proposes an HMS plan with an arch dam at HMS and an arch dam at Lower Canyon, mile 3.7. PNPC also introduced evidence on a Nez Perce plan. It excludes the cost of fish facilities from its plans as impossible to estimate and excludes the Whitebird and Freedom developments as uneconomic until development of the Crevice project further upstream on the Salmon. However, it did include evidence of Whitebird costs. WPPSS presents a Nez Perce plan with an arch dam at Nez Perce with the Whitebird development and, eventually, the Freedom development included. Its HMS plan employs a rock filled dam at Lower Canyon at mile 0.5 on the Salmon and includes the Freedom project for future development.

The staff originally presented comparative plans similar to those of PNPC, but on rebuttal proposed plans based upon an arch dam (the more economical type) at HMS, Nez Perce and Lower Canyon (mile 3.7), but did not include the relatively minor Freedom project or its costs.[12]

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[11] No Whitebird development was proposed in connection with the HMS plan, for the Lower Canyon dam utilizes greater head and would flood the Whitebird site.

[12] Presumably since Freedom power and costs would be equally applicable to both plans and thus represents a "wash" item.

We are of the opinion that the staff rebuttal presentation provides the most valid comparison between the two plans of development. However, the data presented by PNPC and WPPSS on power and costs are shown in the following table for informative purposes.

(1) *Power Production under the Proposed Plans*—The record shows that under most of the estimates, including the staff's revised comparison which we are adopting as most reasonable, the installed capacity would be slightly greater under the HMS plan than under the Nez Perce plan as shown in the tables below:

	Installed capacity (MW)		
	PNPC	WPPSS	Staff revised[13]
HMS plan (HMS, Lower Canyon, China Gardens)	2,180	2,315	2,347
HMS plan (with Freedom and Crevice in operation)	2,700	2,315	....
Nez Perce plan (Nez Perce, China Gardens, Whitebird)	2,062	2,235	2,268
Nez Perce plan (With Freedom and Crevice in operation)	2,626	2,240	....

The record also shows that under most conditions and stages of development of the Snake and Salmon, with and without Canadian storage, the HMS plan would exceed the Nez Perce plan with respect to nominal prime energy (energy during the critical winter storage control period), average annual generation and plant peak capability. This power differential in favor of the HMS plan results from one intrinsic advantage. That is the reservoir elevation at Nez Perce (or HMS) must be limited to approximately 1510 feet so as not to interfere with the Hells Canyon site upstream, but the Lower Canyon dam can be built to produce a higher reservoir and greater power.

[13] Lower Canyon installed capacity of 910 MW and reservoir at elevation 1595.

(2) *Costs compared with power benefits under the rival plans*—Cost estimates for all projects were presented by PNPC, WPPSS, the Department of Conservation of the State of Washington and our staff. There were different original estimates and modifications of them leading to wide variations in cost resulting from different overall project layouts. A summary of some of the cost presentations is shown in the following table. The Freedom project, which would not change the difference in costs as between the two plans, is omitted from the figures. The figures reflect the HMS plan, as composed of HMS, Lower Canyon and China Gardens, and the Nez Perce plan, as composed of Nez Perce, China Gardens and Whitebird, shown on the previous table.

Summary of Construction Costs ($1000) Comparative Plans for Development of Middle Snake River

	HMS plan	Nez Perce plan
Without fish facilities:		
Staff (revised)[a]	$443,089	[b] $393,473
PNPC (direct)	405,673	[c] 403,098
WPPSS (rebuttal)	460,289	[b] 367,253
With fish facilities:[e]		
Staff (revised)	500,022	[d] 471,963
WPPSS (rebuttal)	522,000	[d] 429,000

[a] In making its revised presentation the staff actually used two different project layouts—in one a Harza design with all power plants located across the river, in the other a more economical design with power plants located parallel to the river. We are adopting this second comparison assuming also that the Lower Canyon Dam will have installed capacity of 910 MW and a reservoir elevation of 1595 feet.

[b] Whitebird costs omitted because part of these costs were charged to Nez Perce fish facilities.

[c] Without Whitebird costs amounting to $38,592.

[d] Includes Whitebird costs.

[e] PNPC did not present evidence of the cost of fish facilities.

In each case the Nez Perce plan is the least expensive. Using the PNPC figures this difference is only $2,575,000 (excluding Whitebird and fish facilities in each plan), but using the WPPSS figure the difference is $93,036,000.

As the examiner points out, the difference in cost between the HMS plan and the Nez Perce plan on the basis of the staff comparison ($49,616,000 without fish facilities) is about midway between the difference between the two plans using the PNPC figures and the difference between the two plans using the WPPSS figures. Because the staff's study alone compares the two plans on similar bases, in our opinion it reflects the approximate difference in cost between the two plans.

Annual costs vary roughly with the construction costs, and these are shown in the following table.

Annual Costs ($1,000)[a]

	HMS plan	Nez Perce plan
Without fish facilities:		
Staff (revised)	$28,337	[b] $24,992
PNPC (direct)	26,103	[c] 25,298
WPPSS (rebuttal)	29,030	[b] 23,377
With fish facilities:		
Staff (revised)	32,554	[d] 30,600
WPPSS (rebuttal)	33,373	[d] 27,865

[a] Using stipulated operations and maintenance and administrative and general expenses.

[b] Whitebird costs omitted because part of these costs were charged to Nez Perce fish facilities.

[c] Without Whitebird costs amounting to $2,266.

[d] Includes Whitebird costs.

As the data reflect, the greatest excess of the HMS plan costs over the Nez Perce plan costs are shown by WPPSS

and the least excess by PNPC without the Whitebird development. In fact, PNPC shows an excess of the Nez Perce plan costs over the HMS plan costs counting in the Whitebird development. The staff revised estimates, which we adopt, fall in between.

As shown in the joint exhibit filed by the parties, with Canadian storage available, the annual power benefits of the HMS plan (HMS, China Gardens, Lower Canyon) are $56,649,000. By computation using the power values prescribed in the joint exhibit the power benefits of the Nez Perce plan (Nez Perce, China Gardens, Whitebird) also with Canadian storage amount to $54,367,000 per year. These figures and figures for other stages of river development both with and without Canadian storage show that the HMS plan produces greater power benefits than the Nez Perce plan. In any case annual power benefits exceed annual costs by substantial amounts for each plan, and we find they are each economically feasible.

The staff and the examiner compared the difference between the two plans as to annual costs and as to annual values and derived a net difference between annual cost and value for the two plans. The examiner found that using the staff's revised comparison the HMS plan is superior to the Nez Perce plan in a somewhat vaguely defined initial period, assuming the completion of Lower Canyon, but the Nez Perce plan is superior to the HMS plan in subsequent periods.

WPPSS objects to the propriety of the examiner's comparison arguing that the Lower Canyon project will not be in operation at the time the HMS project goes into service, that the China Gardens project will be delayed beyond the time either the HMS project or the Nez Perce project is completed, and that there is a premature assumption of seven units at HMS although the license application provides for five units. It is true that omission of the Lower Canyon project would show large net benefits in

favor of the Nez Perce plan, the China Gardens development utilizes more head under the HMS plan and so favors that plan, and the more units at HMS, of course, the greater the benefits. Further, there is no question but that these developments may be delayed. However (apart from the fish problem) there is no reason to believe that Lower Canyon would not be built in due time since the evidence shows that Lower Canyon is economic of itself, and if the Lower Canyon project had to be delayed or totally precluded on account of the fish problem so would Nez Perce.

In our view of these and other circumstance the only significant comparative analysis of the two plans is on the basis of the eventual results when all projects which appear to be feasible are built and fully developed. On this basis, as the examiner found, the Nez Perce plan is somewhat superior to HMS. But taking into consideration the present values of an early start on some of the major projects of a plan, we conclude that this superiority is not so great as to preclude a grant for HMS if, as we shall explain below, other considerations exist which make feasible the commencement of HMS construction now, but which would necessitate an indefinite delay in any Nez Perce construction. Thus the HMS plan has the advantage of permitting an immediate start on major facilities which can bring additional power to the area while the fish questions which are common to Nez Perce and Lower Canyon receive further study.[14] Specifically, in the terms of the statute, we find that despite the somewhat greater advantages which might eventually result from adoption of a plan including Nez Perce over one including HMS, adoption for present grant of the HMS project rather than the Nez Perce project will,

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[14] While the record is not complete on the point, there are indications that the fish problem with respect to a Lower Canyon dam will present somewhat lesser difficulties than those involved at Nez Perce, since the problems created by the intermingling of waters from two different rivers will not be present.

for the reasons detailed below, be best adapted to a comprehensive plan for developing the revelant portions of the Snake and Salmon Rivers.

(3) *Other bases of comparison between the plans*—Flood control, navigation and recreation have already been discussed in connection with the Nez Perce and HMS projects. In general the differences between the two plans are not significant. Both plans will provide about the same navigation benefits, and substantial recreational benefits. The HMS plan produces a little more storage because the Lower Canyon dam can be built higher than Nez Perce, but the value of storage is reduced enormously in any case with the advent of the Canadian projects.

C. *The Fish Problem in Connection with the Projects and Plans of Development*

One of the most controversial issues in this proceeding concerns the ability of the applicants to provide for the movement of anadromous fish by their proposed projects. These fish, salmon and trout, as fingerlings, migrate down the rivers to the ocean and several years later as adults migrate up the rivers to their natal headwaters to spawn. The problem here is to determine whether the upstream migrants, which normally progress by swimming and jumping, and the downstream migrants, which are ordinarily carried by the current, can be guided or carried over high dams and through reservoirs such as HMS, Nez Perce or Lower Canyon. Our responsibility for this problem arises from Section 10(a) providing that the project adopted by us will be "best adapted" for improving or developing a waterway for, among other things, "beneficial public uses, including recreational purposes." While the proposed projects and plans are largely designed to produce power, under the statute we are required to consider whether the power use is consistent with recreational and other beneficial public uses including the use of the

river for fishing and the production of fish for both sport and commercial purposes.

According to the record the Columbia River is the greatest producer of Pacific salmon and steelhead trout in the United States. The most abundant species is the chinook salmon, but blueback, silver salmon and steelhead trout are also important. There are three races of chinook salmon, the spring, summer and fall chinook. Of these, the spring chinook, whose most significant source is the Salmon River, are said to be the tastiest and bring the highest prices.

Columbia River salmon have been important in the development of the Pacific Northwest for almost a century. They are caught not only from the river and its tributaries, but also from the Pacific Ocean along the coast. The commercial catch of Columbia River salmon is estimated to be worth $12,000,000 annually and the sport fishing attributable to the Salmon River alone, while no exact estimate can be made, may be worth as much as $8 million a year. The latter figure is based on the amount fishermen spend for the privilege of taking the fish. The value of the fish, of course, cannot be measured alone by the amount spent to take them or the value of the fish as food. Nor can the value be measured by the economic growth stimulated by sport and commercial fishermen. The record and the contentions of the fisheries' interests make it clear that conservation of the fish is an important public end, and we so find.[15]

While the estimating methods employed are subject to inaccuracies, the record shows that a much larger number

[15] We note in this connection that parts of the Salmon River are included in a wilderness area by the Secretary of Agriculture, which is the subject of the Wilderness Bill, S. 4, the purpose of which is to preserve wilderness areas for the good of the whole people. Hearings before the Senate Committee on Interior and Insular Affairs on S. 4, 88th Cong., 1st Sess., pp. 275-276.

of fish would be adversely affected by the Nez Perce dam than by the HMS dam. The witness for the Idaho Department of Fish and Game prepared a study based on a count of the fish passing the McNary dam on the Columbia River and an allocation of the fish to the various tributaries. The allocation was based on recovery of a certain number of tagged fish after death in the headwaters and on a comparison of sports catches at various points. The highest year's count for each species was used in arriving at total fish. The study shows 619,750 spring and summer chinook, fall chinook, blueback and steelhead counted at McNary of which 264,200 are estimated to reach the Nez Perce dam site. Of this number 152,700 are spring and summer chinook, of which all but 10.9 percent turn into the Salmon River. All of the 9,000 bluebacks also use the Salmon River, as well as 74.1 percent of the steelheads. On the other hand 85.7 percent of the 35,000 fall chinook continue up the Snake. Thus out of the total 264,200 reaching Nez Perce 75.7 percent are estimated to migrate up the Salmon and the 24.3 percent up the Snake, including 5.7 percent up the Imnaha.

WPPSS criticizes the derivation of these figures arguing that they are not accurate enough on which to base a decision. While no actual counts were made of the fish passing the Nez Perce and HMS sites and the estimates were based on small samples of tagged fish and questionnaires sent to a fraction of the sports fishermen, the estimates are accurate enough to be of significance because based on data systematically compiled and reasonable inferences. According to the record an actual count on the Snake or Salmon would be inordinately expensive. In our opinion the study referred to above in comparison with the record is sufficient to show that the Salmon River has been and still is of great importance for migrating fish, but that the Snake is now of much less importance.

The applicants have not been unaware of this fish problem and have designed their projects in an attempt to solve

it. At Nez Perce WPPSS plans facilities for upstream passage including a picketed barrier below the dam leading to a fish ladder 273 feet high, which in turn would lead to lock chambers where the fish would be subjected gradually to increasing water pressures and would be discharged into the reservoir 363 feet below the surface. The downstream migrants would be caught in traps in the form of V-shaped louver structures at the Whitebird barrier on the Salmon River and the Imnaha barrier on the Imnaha River, and would then be transported to Nez Perce by barge. A floating skimmer device would also be provided in the forebay of the dam. WPPSS would provide similar facilities at HMS.

The facilities planned by PNPC for upstream migrants at HMS include two fish ladders. One ladder would reach a canal extending 17 miles up the Imnaha River. The other would extend to a point on the dam from which hoppers would carry the fish over the dam and into the reservoir. Downstream Snake migrants would be delivered at the proposed Hells Canyon loading station for transfer by barge to the dam. Downstream Imnaha migrants would be guided by the Imnaha fish barrier to the Imnaha canal and discharged below the dam.

The fish facilities proposed for both upstream and downstream migrants offer a number of hazards. For upstream migrants there are uncertainties as to the operation of WPPSS's proposed barrier below its dam and its proposed fish lock particularly as to the effect of pressure on the fish and whether they will leave the lock. However, the Imnaha canal proposed by PNPC would appear to have a substantial chance of success. The canal would carry only Imnaha water and the fish ladders leading to it would carry principally Imnaha water (except for the introduction of Snake River water at one point on the ladder to attract any stray Snake River upstream migrants). The canal is proposed on the theory that the water from each

stream has a distinctive chemical quality that is recognized by the fish spawned in that stream. There seems a good chance that the Imnaha canal will effect a segregation of the Imnaha fish in a natural manner compared with the confused situation discussed below that would develop in the reservoir above the Nez Perce dam.

As for the downstream migrants the louver barriers proposed by WPPSS are particularly suspect. These are based on the theory that a fingerling fish will follow along the louver in preference to passing with the water between the louver bars. This depends on the behavior of the fish and a lack of water turbulence in the approaches to the louver barriers. WPPSS has presented evidence and contends that its louver barrier at Whitebird will not be rendered ineffective by water turbulence and trash, including floating logs, because of the log barrier to be employed and methods for cleaning the trash racks. Nevertheless the record leaves us in considerable doubt whether the louver device will operate successfully on the Salmon where the current will be swifter and the depth greater than at previous installations. The method of collecting the fish in pipes, a secondary louver and tanks also raises grave questions as to whether the inevitable changes in the quality of the water surrounding the fingerlings will not disturb their instinct for returning to their natal headwaters to spawn.

The record shows that the most important hazard to upstream migrants or downstream migrants passing the louvers is the reservoir created by the dam. As may be recalled the HMS reservoir would extend 58 miles up the Snake River while the Nez Perce reservoir would extend in two branches, one 61 miles up the Snake River and one 63 miles up to the Whitebird fish barrier on the Salmon River. The difficulty arises because the chinook are basically river fish and do not appear to adapt to the different conditions presented by a reservoir.

A reservoir exhibits a peculiar thermal structure. During the winter it is homogeneous with regard to temperature, but as the season advances a horizontal stratification results with the colder water sinking lower. Since Salmon River water is colder than Snake River water, it is possible, if not probable, that in the Nez Perce reservoir the water from the two rivers would be found in separate layers and be drawn off at different times. Presumably the upstream migrants reaching fish ladders might at one time be presented with water from one river and at another time water from the other river. If water quality is important in attracting the upstream migrants to their proper streams, as many experts believe, this stratification would be a source of confusion and delay. Also a source of confusion to the upstream migrants would be the predicted tendency shown by the record for water from the Salmon River arm of the Nez Perce reservoir to flow up the Snake River arm and vice versa. Again the fish are faced with a complicated problem in finding their way.

The velocity of flow in the Nez Perce or HMS reservoir would be very low compared with the free flowing stream or even compared to the flow in the reservoir of the McNary dam on the Columbia. Since the upstream migrants follow water flow and downstream migrants are carried by current, such low velocities offer a further obstacle to the passage of anadromous fish.

The record also shows that during the summer months the oxygen content of the water in the reservoir at the lower levels will fall to amounts which are dangerously insufficient for salmon. The decrease in oxygen content appears to be due to decomposed sinking dead organisms (plankton) from the upper layers of water. The record indicates that salmon require an oxygen content of approximately five parts per million, yet the oxygen content at the 250-350 foot level would fall in August to less than three parts per million.

Another phenomenon of importance is "residualism," a term used to describe the failure of anadromous fish to pass through the reservoir to the ocean. If loss of water velocity or accumulation of dissolved salts can cause the donwstream migrants to remain in the reservoir, they are lost as perpetuators of the species, since residual fish do not spawn successfully.

WPPSS tries to rebut the evidence with respect to reservoirs. It cites testimony to the effect that it is not known how a salmon finds its way back to its home stream, that Salmon River water will not appear in the Snake River arm of the reservoir and that the salmon will be able to follow the cool lower strata of water to the upper end of the reservoir. As to the oxygen content issue, which would of course affect this cool lower water, WPPSS argues that the fishery witnesses' testimony did not take into account that the Salmon River contains pure, soft water which would not be conducive to high plankton production, the most important factor in oxygen consumption, and has exaggerated the time that water is retained in the reservoir.

These are matters which, in the present state of the knowledge of fish habits are highly controversial, and are not in our opinion clearly resolved in the record. There is abundant evidence, however, that a reservoir, such as the one that would be formed by the Nez Perce dam (or HMS) would provide many risks to the upstream migrants. Alternative methods of handling the problem suggested by WPPSS do not obviate these severe risks. Thus transporting adult fish in tanks involves the danger of injury and disease. Establishment of hatcheries would not necessarily be effective. While the propagation of fall chinook in hatcheries has been successful, the same is not true of spring and summer chinook although WPPSS argues that it could be done.

As a result of our consideration of the evidence raised in this copious record we agree with the contentions made

by the fishery interveners and the staff that high dams and reservoirs present major obstacles to anadromous fish. In the present state of the art it is not possible to build facilities for fish passage with any assurance that they will be effective. The Nez Perce project affects both the Snake and Salmon Rivers and would endanger the fish runs on the Salmon; the HMS project affects only the Snake River where the fish runs are already impaired.

The Snake River fish runs are already subject to the constructed Brownlee and Oxbow developments and the Hells Canyon development, now under construction, of the Idaho Power Company (Project No. 1971, 14 FPC 55). In this connection we take notice that the Idaho Power Company seeks to abandon as ineffective the facilities for downstream migrants required by us at the Brownlee Project (see our order in Project No. 1971 of March 22, 1963). While the eventual effect of the present Snake River projects on the fish runs is not shown in the present record, another project on the Snake would obviously not constitute the threat to the Columbia River fish runs in any way comparable to a project on the untouched Salmon River. This appears to be also the view of the Corps of Engineers expressed in a report to the Secretary of the Army dated March 31, 1961, where it was stated that "at least 15 to 20 years might be necessary to resolve the problem that would be created by the Nez Perce project" while "The High Mountain Sheep project could be constructed now without being a serious hazard to the anadromous fishery." Likewise the Secretary of the Interior, whose department is largely responsible for the preservation of wildlife, stated in a letter of June 28, 1962, that a "calculated risk" at Nez Perce "would not be warranted" but that "The Mountain Sheep project represents less hazard to the fishery resource than the Nez Perce project."

We are well aware, that in reaching this conclusion we are departing from the optimism as to the efficacy of fish

passage facilities on high dams which was reflected in the decision approving the application of the Idaho Power Company for its three developments on the Snake River (Project No. 1971)[16] as well as in the original decision on PNPC's application for the Mountain Sheep and Pleasant Valley projects. We can only state that nothing in this record made in the light of subsequent knowledge or which has come to our attention in the course of our day-to-day dealing with the problem in the past two years would justify continuing such optimism. We can hope for the best and we will coninue to insist that any licensee building a high dam at a site which presumably involves major fish runs do everything possible within the limits of reasonable expense to preserve the fish runs. But as of now we understandably must assume that the best efforts will be only partly successful and that real damage may and probably will be done to any such fish runs.

WPPSS alleges it was denied due process as a result of the examiner's handling of the fish issue at the hearing. It complains that the rights of the parties were subordinated to considerations of speed and counsel was cut short in efforts to cross-examine the witness for the Idaho Commission. WPPSS also argues that PNPC was given first chance to cross-examine although PNPC's cross-examination was friendly rather than hostile, so that the witness was able to expand his testimony. When counsel for WPPSS attempted cross-examination, it says, objections were sustained on the ground that the subject matter had already been covered. We are of the opinion the WPPSS's allegations are not sustained by the record and that, in any case, the rulings made by the examiner were not prejudicial.

Although counsel for PNPC was allowed to cross-examine the witness for the Idaho Commission first and may have enabled the witness to amplify his testimony, this does not

[16] 14 FPC 55.

constitute error even if it could be argued that it lengthened the record unnecessarily. Counsel for WPPSS was permitted lengthy cross-examination of this witness; his examination covered some 150 pages in the transcript. WPPSS has set forth thirty-eight instances in which it alleges that the right to cross examine was improperly denied by the examiner. Upon consideration of the questions asked we think that the examiner was not in error in sustaining objections to the questions. In each instance it could reasonably be said that the questions were defective —irrelevant, argumentative, repetitious, or outside the competency of the witness—and we do not think the examiner erred. In several instances counsel for WPPSS secured an answer by a differently phrased question.

Even assuming that some few of the examiner's rulings may have been legally erroneous they are not, we believe, prejudicial. The questions concerned a wide variety of subjects such as possible bias of the witness, fish counts and allocation of fish among river tributaries, angling activity, computation of numbers of down-stream migrants on the basis of eggs layed, differences between the Brownlee dam and the proposed Nez Perce dam, comparison of the louver device at Whitebird with one on another river, the effect of water pressure on spawning, and the necessary size of fish ladders. These subjects are for the most part relevant, but none of the questions or their possible answers would cast doubts on the essential basis of our decision here that there are undeniably large numbers of salmon that make use of the Salmon River, that a high dam and reservoir represents a major danger to the fish runs despite WPPSS's best efforts to surmount the problem, and that the Salmon River runs will not be damaged by a dam at HMS.

In order to assure a sufficient flow of water to maintain fish life below the HMS dam the Idaho and Oregon Commissions have recommended amendment of the examiner's

ordering paragraphs relating to flood control and navigation. While sympathetic with these Commissions' objectives, the record fails to justify adoption of this recommendation. The two commissions have also asked that conditions be inserted in the license providing for the replacement of fish and wildlife habitat affected by the license. We think this is too broad a requirement and will use the paragraphs relating to fish and wildlife which we are now employing in other licenses. These appear as Articles 16 and 53 in the conditions.

D. *Conclusion on the River Projects and Plans of Development*

As between the proposed HMS and Nez Perce projects we find that HMS itself is a smaller project with a lesser ability to generate power and a significantly lesser ability to store flood waters (a matter of importance only until the advent of Canadian storage). However, as a plan of river development the HMS plan, although somewhat more costly and possibly producing power at a higher unit cost, produces more benefits than the plan involving Nez Perce. While the estimates are contradictory, it does not appear that the net benefits of either plan are very much greater than the other. The HMS plan, however, has one decisive advantage over the Nez Perce plan. It permits postponement of a dam on the Salmon River until the fish passage problem is more clearly solved. On this basis we believe the HMS site rather than the Nez Perce site should be developed.

WPPSS argues that permitting the fishery issues to be a dominant consideration was inconsistent with past Commission actions. It is true that we have approved projects where some damage to fish appeared likely (see *City of Tacoma,* 10 FPC 424) in order to avoid denying the project. But this does not and cannot mean that the fishery resource must inevitably yield to power considerations. A balancing

of equities, in the light of the relative importance of the two claims on our natural resources in the particular case must be determinative. Here the fishery resource is a major one. Insofar as a further dam on the Snake is concerned, we believe that the power factors outweigh the possible loss, even assuming that the best efforts at HMS will further diminish the already impaired fish runs there.

PROPOSED DEVELOPERS OF THE PROJECTS

Having narrowed the problem to the proposed HMS project and plan of development, we have before us PNPC's application for a license for this project, WPPSS's amendment of its Nez Perce application to include HMS, and the request of the Secretary of the Interior not to grant any license but to recommend Federal development. We do not think differences in construction features or differences in cost as between the two applicants for the HMS project are decisive because the plans are not final and can be modified and undesirable features eliminated.

As between the applicants, the initial question is a legal one, i.e., whether PNPC has a priority under its preliminary permit. If so, as we believe is the case here, the license should be issued to PNPC provided that it conforms to the requirements of the Act in other respects. For instance, in order that its project, HMS, be "best adapted" within the meaning of Section 10(a), there should be a sufficient market for its power. If PNPC has a priority under its preliminary permit, it will not be necessary to consider whether WPPSS would otherwise have a preference under Section 7(a), for that Section only applies "where no preliminary permit has been issued." Further, it is not necessary to resolve other questions relating to WPPSS such as its legal capacity to undertake a project outside of its own state.

Finally, we have before us the issues raised by the Secretary of the Interior in his request that federal construc-

tion be recommended. The most important of these issues is whether a non-federal licensee can effectively coordinate the operation of a Snake River project with the federal projects downstream and whether a probable delay as a result of federal construction would prevent the region and PNPC from obtaining needed power resources.

A. *PNPC's Priority Under its Preliminary Permit*

This legal question is twofold: did the preliminary permit granted PNPC on April 8, 1955 expire before its stated term of three years in the absence of any order terminating the permit; and was the permit limited to the site described in the application for a preliminary permit or did the permit extend to that project which was best adapted to a comprehensive development of that reach of the river?

A preliminary permit is issued under Section 4(f)[17] of the Act to enable an applicant for a license to make studies and gather data and at the same time under Section 5[18] to maintain its priority of application. Section 4(f) specifically states that the permits are to enable applicants to secure the data and perform the acts required by Section

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[17] *Sec. 4.* The Commission is hereby authorized and empowered—
(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by Section 9 hereof: * * *

[18] *Sec. 5.* Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority may be maintained. Such permits shall not be transferable, and may be cancelled by order of the Commission upon failure of permittees to comply with the conditions hereof or for other good cause shown after notice and opportunity for hearing.

9. The latter requires that each applicant submit to the Commission "maps, plans, specifications and estimates of cost as may be required for a full understanding of the proposed project." Section 5 refers to the permit as being "for the sole purpose of maintaining priority for a period, not exceeding three years, for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements." The statute limits the purpose of the permit to priority to avoid any interpretation that it represents permission to begin construction. The statute does not prevent but clearly contemplates that proposals and plans made at the time the permit was issued may be changed as a result of investigations made by the permittee. At the same time the permittee is protected by the permit from rival applicants while incurring expenses in the investigation of a project intended and required by Section 10(a),[19] to be best adapted to a comprehensive development of the reach of the river involved.

We consider it evident that the statutory intent of these provisions is to give a permittee the first right to develop that reach of a river to which the permit relates. Any other interpretation would make the permit meaningless, for if another party could obtain a permit or apply for a license for a nearby project that would develop substantially the same head as the one described in the original permit, there would be no protection to the first permittee.

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[19] *Sec. 10(a).* That the project adopted, including the maps, plans and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

Likewise, if another project affecting essentially the same reach of the river were not considered within the original permit, the original permittee could apply for a separate three-year permit for such project and could thus tie up the development of the river for a period of time substantially in excess of that contemplated in the statute. Thus, to construe these statutory priority provisions narrowly would be, in effect, to write them out of the Act.

To interpret the priority afforded by a permit as limited to a single project would also be contrary to the two most significant objectives of the Act, namely, to encourage the development of our nation's water resources, and to insure that such development would be best adapted to the fullest use of the river, considering all uses. Who would be willing to undertake substantial and expensive investigations looking toward development of a river if a permit were good only in the event—the unlikely event—that the results of the investigations coincided precisely with the permittee's guesstimate at the time the permit application was filed? In this connection, it is the experience of the Commission that a project is rarely constructed at the same exact site and in the same fashion as originally contemplated. Indeed, we are unaware of a single instance where this is true. For example, in the *Alabama Power* case[20] the permit listed specifically five developments on the Coosa River in Alabama. The license also provided for five developments covering approximately the same reaches of the Coosa River but with three of them in different locations.[21] In the *Grant County* case[22] the permit

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[20] *Alabama Power Co.*, 13 FPC 1235, 18 FPC 265.

[21] The permit described projects at river miles 13.5, 67.5, 105.7, 148.5 and 227.0, while the license described projects which are located at river miles 12, 51, 98, 147, and 227.0.

[22] *Public Utility District No. 2 of Grant County*, 13 FPC 1462, 14 FPC 1067.

described one dam, Priest Rapids, at river mile 397 on the Columbia River, but the license described two dams for the same reach of the river, Priest Rapids at river mile 397 and Wanapum at river mile 415.

If priority extended only to that project described in a permit, the pressure would be great upon the permittee not to explore fully alternative projects which might be superior. Clearly, if such investigations were conducted and an alternative development were considered preferable, the first permittee would be in danger of losing its opportunity to develop needed generating capacity as a result of its own actions. Thus, a narrow interpretation of the priority provisions would serve to undermine the objectives of Section 10(a) of the Act which is designed to insure the optimum development of our water resources. As a unanimous Commission recently held:[23]

> It [preliminary permit] is granted in a situation where the feasibility of a project in a particular stretch of a river has not as yet been demonstrated. It gives the permittee a priority over other non-Federal parties in order to encourage the investigations of projects which otherwise might never be investigated or built.

In view of the incongruity of a narrow interpretation of the priority afforded by a permit with the fundamental objectives of the Act, as well as the specific provisions on priority itself, it would require a compelling showing to convince us that PNPC's preliminary permit is of no effect respecting PNPC's HMS license application. To the contrary, we view the numerous terms of PNPC's permit as describing that type of permit contemplated by the Act.

There are six specific articles in the permit which required PNPC to cooperate with various federal, state

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[23] *Georgia Power Company*, Project No. 2303, "Order Denying Application for Preliminary Permit", issued April 2, 1962.

and other interested agencies for the purpose of evolving the best development of the Snake, irrespective of the detailed description of the project as tentatively proposed. Article 10 required PNPC to cooperate with the U.S. Forest Service to develop a plan for alleviating damage to and achieving maximum utilization of National Forest resources. In Articles 11 and 12, the permittee was obliged to negotiate and cooperate with the U.S. Fish and Wildlife Service and various commissions of the states of Idaho and Oregon in formulating measures in the interest of fish and wildlife conservation. Article 13 required PNPC to cooperate with enumerated State departments and commissions and with the U. S. Forest Service regarding the recreational phases of the project. PNPC was required by Article 14 to cooperate with the Bureau of Mines concerning mineral resource possibilities. Most importantly, Article 15 required PNPC to cooperate with the Corps of Engineers and the Bureau of Reclamation "* * * with the object of determining a plan of development for the two sites best adapted to a comprehensive plan of development of the water resources of the Snake River." To adopt a narrow interpretation of the permit would be anomalous in that PNPC would be required to develop the best plan of development when it would thereby lose its priority to carry out the development.

WPPSS emphasizes that language in paragraph (A) of PNPC's permit, i.e., "This preliminary permit is issued * * * for the sole purpose of maintaining priority of application for a license for Project No. 2173 * * *." However, the specificity in applications for permits required by our regulations arose from the necessity of limiting unnecessary reservations of land for power purposes to the detriment of the public. The legislative history of the Water Power Act evidences a grave concern with undue reser-

vations of public lands for such purposes.[24] It was for this reason that our regulations were designed to provide a detailed description of the lands occupied by the project. While it is not possible to achieve these desired results in every case, as here, we do not view those situations as adequate justification for abandoning our attempts to insure a sensible program of land withdrawals. Thus, as stated above, our regulations governing the filing of applications for preliminary permits require the specification and the location not only of the lands to be used but also of the major project works. Any application for a permit failing to contain the required specificity would be rejected under our Rules. Section 4.81 of our regulations under the Federal Power Act which specifically deals with the filing of applications for preliminary permits, as well as Section 1.14(a) of our Rules of Practice and Procedure, specifically provide for such rejection.

While the detailed description of site in both the application and in the resulting permit enables a sensible program of land withdrawals, we do not believe that this aspect

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[24] Hearings, House Committee on Public Lands, 63rd Cong., 2d Sess. on H.R. 14893, May 5, 1914, p. 195, 357-359; Cong. Rec. July 20, 1914, vol. 51, pp. 14061-14062, debate on H.R. 16673. Hearings, Senate Committee on Public Lands, 63rd Cong., 3rd Sess. on H.R. 16673, Dec. 17, 1914, pp. 351-355; H.R. No. 16, 64th Cong., 1st Sess. 1916, Report of Committee on Public Lands to Accompany H.R. 408; Cong. Rec. Jan. 5, 1916, vol. 53, p. 527, debate on H.R. 408; Hearings, House Committee on Water Power, 65th Cong., 2d Sess. May 13, 1918, p. 623-624; Cong. Rec. Sept. 5, 1918, vol. 56, p. 10035, debate on S. 1419; Cong. Rec. July 1, 1919, vol. 58, pp. 2243, debate on H.R. 3184.

should be or is controlling with respect to the scope of a permit.[25]

Moreover, we view the language in paragraph (A) of the Commission's order above cited as emphasizing the fact that no construction authority was being granted, but only a priority to conduct investigations. In several early proceedings, various parties appeared in opposition to preliminary permits when the opposition related to the project itself, and not to the priority aspects of a project.[26] In these cases, the Commission emphasized that only a priority was involved and that the merits of the project ultimately sought was the subject matter of license application.

The scope of a preliminary permit containing language identical to that in PNPC's permit was specifically con-

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[25] After carefully selecting and citing the general requirements of the regulations, the minority assert that it can find no unyielding requirements of specificity. If the minority had gone further and considered Exhibits E, F, H and I prescribed by Section 4.82(k), the specificity we referred to would have been discovered. Exhibit H, for example, requires:

> *Exhibit H.* A general map showing the nature of *the proposed project, its principal features and their location, and the location of the project as a whole with reference to some well-known town or stream.* On this map shall be placed a line indicating the approximate project boundary of the area to be occupied by the principal project works, such as, dams, reservoirs, forebays, waterways, and powerhouses, but excluding transmission lines, and *where necessary in order to determine the location of such structures on the ground, there shall be shown on the map their relative positions with respect to permanent monuments or objects that can be readily recognized from descriptions thereof noted on the map.* (See specifications for drawings, § 4.42.) [Emphasis added.]

[26] *E.g., Linoma Power Co.*, 8 FPC 999 (1949).

sidered in the *Montana* case.[27] Montana was the permittee for proposed Project No. 2164 (at mile 36.4) and 2163 (at mile 60.7) on the Flathead River. Previously, Montana had been issued a permit for Project No. 2135 at mile 68.6. Project No. 2163, if constructed would have inundated Project No. 2135. Subsequently, Montana filed for a fourth permit, identified as Project No. 2223. If constructed, this project would develop the same reach of the river as Projects Nos. 2163 and 2164. On January 8, 1957, the Confederated Salish and Kootenai Tribes filed an appearance in opposition to Montana's application for a permit for Project 2223. They characterized that application as an attempt to secure an unlawful priority to apply for a license.[28] The Secretary of the Commission had previously requested additional support for the grant of the permit since it appeared that Montana's existing permits enabled it to conduct the necessary studies regarding Project 2223. In response, Montana agreed that the same reach of the river was involved in its existing permits as was covered by Project 2223. Nevertheless, it pointed out that proposed Project 2223 was substantially different from the projects contemplated under permits 2135, 2163 and 2164 and went on to describe some of these major differences. Nevertheless, the Commission denied the application for a permit for Project 2223 as unnecessary. That order carefully explains that the amendment was denied because the examinations, surveys and other acts, the performance of which is contemplated under a preliminary permit could be made with respect to Project 2223 under the outstanding preliminary permits for Projects 2163 and 2164. The Commission made this finding

[27] *The Montana Power Co.*, 17 FPC 834. Actually this language is found in virtually every preliminary-permit granted by the Commission. In fact, we are not aware of any permit containing broader language.

[28] Subsequently, these tribes filed an application for a preliminary permit for Project No. 2285 which involves the same reach of the Flathead River.

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notwithstanding the different identification numbers assigned to the two proposals. The holding in this contested proceeding cannot be reconciled with the minority's position.[29]

Both Staff and WPPSS, argue, in effect, that the priority granted by a permit, irrespective of the scope thereof ceases to have independent efficacy upon the filing of a license application. We disagree. Section 5 provides for priority "for such period or periods, not exceeding a total of three years * * *." It does not state that a permit expires when a license application is filed nor does it state that a permit somehow "merges" into a license application. Moreover, Article 3 of PNPC's permit specifies certain conditions under which the priority granted by the permit will be lost. None of these conditions is present in this case. Staff and WPPSS place substantial weight upon an opinion of the FPC General Counsel given in 1923. This obscure opinion is not mentioned in any Commission determination of which we are aware. Moreover, the basic issue discussed in that opinion is whether priority extends beyond the term specified in a permit in situations where a permittee filed a license application within the duration of the permit. On this point, there is no dispute. But that is quite a different question from the one involved here, i.e., whether a permit terminates upon the filing of license ap-

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[29] The minority allege the requested amendment in that case specified a project "at precisely the same site the applicant was already exploring under an existing permit for a smaller dam." A careful review of the *Montana* record does not support this allegation. But even if it were true, the scope of a project and its effect on adjacent lands, waters and other potential projects are affected not only by the site of a project but also by several other features, such as its height. The minority further point to the *Appalachian case* (17 FPC 8, 19 FPC 169) in which an amendment was allowed. That case involved a request for a completely new project—14 miles away—in addition to that already the subject of a permit.

plication. As the minority correctly recognize in one place, the instant case represents the benchmark decision on the latter issue.

PNPC's original license application for a two-dam Mountain Sheep Pleasant Valley development places the dams at a slightly different location than the permit described. And PNPC actually made investigations under the permit of no fewer than three different one-dam High Mountain Sheep developments.[30] This was consistent with the Resolution of PNPC's Board of Directors, embodied in its application for a permit, which authorized its officers

> "to apply • • • for a Preliminary Permit • • • to make studies, surveys, and investigations of the feasibility of hydroelectric power developments *in the vicinity of the* Mountain Sheep and Pleasant Valley Hydroelectric sites on the Snake River, in the States of Idaho and Oregon, for the purpose of enabling the company to secure the data and perform the acts required by law for filing an Application *or Applications* for the issuance of a license or licenses;" [Emphasis supplied; Exhibit B, application for preliminary permit.]

After the Mountain Sheep-Pleasant Valley application was denied, PNPC was fully aware of the fact that the term of its permit soon would expire. In its application for rehearing of the Commission's Opinion and Order denying the license, PNPC requested the Commission to protect its priority in addition to its argument for the licensing of Mountain Sheep-Pleasant Valley. It asked that the matter be set down for rehearing to consider such modification of its project as would represent the most comprehensive development of the resources. Article 3 of its permit specifically provided for the Commission's modification of the plans submitted by the permittee as, in the judgment

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[30] Tr. 1474-5, Project No. 2173.

of the Commission, would be best adapted to a comprehensive plan of development. PNPC pointed out particularly that an HMS dam between the Salmon and Imnaha had not been considered by the Commission. Nevertheless, on March 20, 1958 (19 FPC 353) the Commission issued an order denying rehearing stating that an opinion would be issued later.

PNPC was faced with a serious problem. Its three-year permit would expire April 1, 1958. It might have obtained an amended permit specifying Nez Perce, but this was most doubtful in view of the *Montana* case, *supra*. More importantly, PNPC adhered to its position that any project which blocked the fish runs on the Salmon was not the best development. While its application for rehearing was denied, there was no opinion and PNPC could not know whether its priority would be preserved by Commission action under Article 3 of its permit. In the meantime, additional studies indicated the probable geological feasibility of the HMS site, and PNPC filed a license application for a project for this site, a site 3.4 miles below the initially proposed Mountain Sheep development.[31] Subsequent to the filing of this license application, the Commission released its opinion on rehearing declaring its view that any combination of projects which includes Nez Perce is consistently superior to any combination which does not include Nez

[31] In a footnote, WPPSS makes the argument in cursory fashion that PNPC's HMS license application was incomplete when it was initially filed, and was not completed until after the term of the preliminary permit had expired. Section 4.81 of our regulations and 1.14(a) of our Rules of Practice referred to above provide for rejection of applications tendered to the Commission which do not contain the requisite information. PNPC's HMS license application was not rejected but was accepted for filing by the Commission. The fact that additional data was requested here, as in most cases, and submitted does not change our view regarding the adequacy of the filing or the correctness of its acceptance. WPPSS's contention is untimely and unmeritorious.

Perce. Interestingly, the Commission did not make the requested finding that a Nez Perce project represented the most comprehensive development of the Snake, considering all uses. Thus, while the dream of Nez Perce was considered adequate justification for a denial of an alternative development, it is anomalous that the Commission apparently lacked the necessary conviction to make or direct appropriate modification of PNPC's plans under Article 3 of the permit to specify Nez Perce.

As a matter of fact, PNPC is to be commended for sticking with its concept regarding the proper development of the Snake. With the issuance of the Commission's opinion on January 20, 1958, indicating its conclusion that Nez Perce represented the best development of this reach of the Snake, it would have been an easy matter for PNPC to have promptly filed a license application specifying this site. This it did not do. Rather, it insisted that any proposal which would block the Salmon River was not best adapted to comprehensive development. While equitable considerations are not relevant to determining the scope of a preliminary permit, we are nevertheless constrained to observe the irony involved in rejecting PNPC's proposal to develop the Snake when its HMS application would promptly have been granted had the Commission properly analyzed the relative merits of a Nez Perce project.

Our dissenting colleagues also recognize the need for flexibility and attempt to avoid any interpretation of a permit which would impose the "impossible demands" of requiring parties to guess in advance of exploratory studies conducted under a permit. The minority's solution, i.e., filing of amendments to permits, is incomplete because the all important question remains: Does a party having a permit have a right to an amendment to the permit for a project concerning the same stretch of the river? The minority carefully fails to answer this critical point. If they answer negatively, their solution is frustrating and

fatuous since it would encourage parties to perform useless activities. If they answer affirmatively, they are simply imposing additional filing requirements of no substance since, in effect, a party obtains priority to a given stretch of the river under the orginal permit.

The dilemma of the minority may be attributable, at least in part, to its misunderstandings on two important points. First, our decision will not result in tying up our nation's waterways for extensive periods to the exclusion of applicants accorded preference by Congress. Private parties do not have exclusive rights to permits. Preference parties not only have an equal chance to obtain a permit but, in addition, have a preference for a permit guaranteed by Section 7(a). A second major misconception is that our decision would somehow fail to give adequate notice to preference parties of the developments contemplated under a permit. Once a party, preference or otherwise, has a permit describing a project which would develop a specific stretch of river, everyone is on notice that the permittee has priority to construct at least the project described in the permit. Quite clearly, this would foreclose *any* development on that stretch of the river contemplated by any other party. It is therefore inconsequential, as far as notice is concerned, if the construction plans are altered as long as the same reach of the river is involved.

We therefore conclude that PNPC is entitled to priority for its application to develop the HMS site. Accordingly, the preference provisions of Section 7(a) are not applicable with respect to WPPSS. Section 7(a) states that, as a matter of law, preference rights to state and municipal bodies apply only in those situations where no preliminary permit has been granted, regardless of our individual predilections. Even the minority ultimately reveals its concurrence with this limitation, although this concession is nearly lost in its extended discussion of the legis-

lative history of preference, a discussion, incidentally, with which we agree.

In the event our decision on priority is adjudged to be erroneous, it would be necessary, under Section 7(a), to give WPPSS a reasonable opportunity to make its plans equally well adapted to those of PNPC and to evaluate such plans following a hearing thereon. An important element to be developed at the hearing would be WPPSS's need for HMS power. As stated below, the present record is sorely deficient respecting the existing generating capacity of the entities comprising WPPSS. This information would be essential in any determination of the entitlements of WPPSS to a preference under Section 7(a).

This as well as additional data would also be required regarding the financial feasibility of the WPPSS proposal. As pointed out below, we would not grant a license to WPPSS in the absence of far better showing of its ability to finance HMS construction.

Following the hearing on this issue, we would then determine if preference properly accrues to WPPSS, and the effect of such a preference, if any, in the light of all the other factors relevant to a disposition of these applications. We cannot make such a determination at this time, nor is there any reason so to do in view of our finding that PNPC has priority. For the same reason, it is unnecessary to resolve the serious question respecting the legal status of WPPSS outside the State of Washington. Section 9(b) of the Federal Power Act expressly requires from license applicants:

> (b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distrib-

uting power, and in any other business necessary to effect the purposes of a license under this Act.

Idaho has a statute governing this situation. Section 61-327 of the Idaho Code states:

> No title to or interest in any property located in this State which is used in the generation, transmission, distribution or supply of electric power and energy to the public or any portion thereof, shall be transferred or transferrable to or acquired by directly or indirectly by any means or device whatsoever, any government or municipal corporation, quasi-municipal corporation or governmental or political unit, subdivision or corporation organized or existing under the laws of any other state; * * *

Both the Idaho and Oregon Utility Commissions object to the licensing of WPPSS on the basis of WPPSS's failure to comply with state laws. Moreover, a U. S. District Court has found that WPPSS lacks authority from its own state of Washington to develop hydroelectric projects outside the state.[32]

Without deciding this issue, nevertheless the very existence of these acts, however controversial, belies the minority's easy assurance that WPPSS is so qualified. The *First Iowa* case which they cite expressly recognizes a dual system of control by the states and the federal authority:

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, *the Act establishes a dual* system of control. The duality of con-

[32] *WPPSS* v. *PNPC*, 217 F. Supp. 481 (1963).

trol consists merely of the division of the common enterprise between two co-operating agencies of the Government, each with *final* authority in its own jurisdiction. [328 U.S. 152, 167, emphasis added.]

B. *Power Resources and Requirements*

Evidence was presented by PNPC, WPPSS, and staff on the load requirements of the Pacific Northwest and on resources to meet these requirements by both PNPC and WPPSS. The figures submitted by the parties differ somewhat because, among other things, PNPC used a different area and did not include old steam capacity in the resources. Staff used lower growth figures since population and industrial growth did not measure up to earlier estimates. The figures are extensive and based on estimates as to future loads and resources. They take into account proposed projects such as Monumental, Boundary and Libby, and also the effect of storage under the proposed treaty with Canada, ratification of which was assumed in 1961. The figures, however, do not take into account demand and additional resources that may be available from the proposed inter-tie with California. The effect of the evidence, assuming a further three-year deferral of the Canadian treaty ratification, is to show a substantial deficiency in both capacity and in average energy during the critical storage control period (usually the winter months) at least by 1970-71 in an amount that is substantially greater than the power that would be available from the HMS project.

The Secretary of the Interior argues that the future power deficiency will be removed by the construction of additional projects on the Snake and Columbia and by the Hanford nuclear project. In fact, he says, that by 1967-68 the area will be faced with substantial surplus resources. PNPC itself admits that since the record was closed nine projects have been scheduled in addition to those included in PNPC's evidence. It is natural, of course, that as time

passes other projects will be authorized by Congress and scheduled. Otherwise, large deficiencies would develop that would have to be met by more expensive steam generation. We will take notice that such projects are scheduled, including the Hanford atomic reactor, but it appears that at least part of the capacity of HMS could be used on a regional basis by the year 1970-71 assuming ratification of the Canadian treaty this year. The record shows that Canadian storage postpones the regional need for power a year or so. Because of the need of further investigation of the site, preparation of final plans and construction, the HMS project will not be in service in any case until around 1970.

Of more significance in our opinion than the regional power situation are the load and resources of the PNPC companies themselves. The evidence shows, taking into account deferral of the Canadian storage, that the PNPC companies can use the power from the HMS project as soon as 1964-65, and that by 1970-71 the deficiency would be substantially greater than the power that would be available from the HMS project.

We are aware that the four companies have acquired further resources since the preparation of the figures; namely, a share in the Hanford and Wells projects. This is material outside of the record, but it would not appear that these additional resources would meet the load deficiencies in 1967-68 and later, even with HMS.

The Secretary and WPPSS argue that PNPC can obtain its requirements elsewhere; that is, from the Northwest Power Pool, including BPA. The Secretary says that the possibility is extremely remote that he will "pull back" power now sold to private companies. This action could be taken pursuant to the Bonneville Act,[33] which provides that the administration shall "give preference and priority to public bodies and cooperatives" (Section 4(a)) and

[33] 16 U.S.C. § 407.

that "in the case of a contract with any purchaser engaged in the business of selling electric energy to the public, the contract shall provide that the administrator may cancel such contract upon 5-year notice in writing if in the judgment of the administrator any part of the electric energy purchased under such contract is likley to be needed to satisfy the requirements of the said public bodies or cooperatives referred to in this Act" (Section 5(a)). Actually, under letter of August 10, 1960, the Secretary exercised the "pull-back" provision in providing for a declining schedule of deliveries (none in 1966-67 and none after 1970). In view of these statutory provisions, it is our opinion that PNPC is not able to rely on any power supply that BPA may have available, and the company can reasonably claim a need for its own supply. In fact, we think it owes a duty to its customers to obtain power that is not subject to this statutory disability.

In contrast to PNPC we find that WPPSS and its members and the public power agencies that would participate in Nez Perce do not have the same need for generating capacity as PNPC. According to the record, WPPSS's loads will be met by the generating resources of its own members, and by BPA until 1970. While WPPSS argues that it has no assurance that BPA will be able to supply power to it after 1970, and that in any case the price will go up, WPPSS has a preference for BPA power while PNPC does not. Thus WPPSS is in a far better position to include BPA power as a resource in its planning than is PNPC. WPPSS has failed to show on the record the amount of power resources owned by its members and participating agencies, but we take notice that they are considerable and that WPPSS has failed to take them into account in making its presentation of a need for power. The sketchy evidence in the record on this point shows that the WPPSS member organizations operate generating plants and will operate a plant on the main stem of the Columbia, and that the Cowlitz County PUD operates a steam plant and the Grays

Harbor PUD another steam plant. In fact, by the year 1970-71 WPPSS would have available assured resources including power from BPA now available and that withdrawable from others in the amount of 1,907 mw or 144 percent of the estimated load.

To add the resources of HMS to those of WPPSS would be adding a surplus to the resources available to WPPSS. The record shows that WPPSS and its members contemplate disposing of this surplus power to other public agencies, then to industries and private utility companies under contractural provisions that permit the drawback of the power when it is needed by the WPPSS participants. It is relying for the disposition of its power on 46 public agencies which in reply to a letter from WPPSS had signed commitments for the power. While we would not require firm contracts for the power these commitments were on the express condition that the power to be purchased would be at a cost which would make it attractive compared to other long-range alternatives and on mutually satisfactory terms. Whether or not WPPSS and its participants prefer to take HMS power and let the BPA power go to the private utilities, or prefer to hold on to the BPA power and sell the HMS power does not change the result. WPPSS has available power, not set forth in the record, and also BPA power for which it has a preference, while the PNPC companies do not have any preference for BPA power and can use the entire output of HMS as soon as it can be expected to come into operation. The record indicates that a project will not be needed to meet the loads of public agencies in the Pacific Northwest, including those of WPPSS, until some indefinite time after 1970. This is consistent with the statement of the Secretary of the Interior that BPA is suffering a reduction in revenues because of a lack of market for its power.

In summary as to the need for power, we conclude that the PNPC sponsoring companies will be able to use HMS

power as soon as it is available. On the other hand WPPSS has failed to demonstrate any need for such power now or in the foreseeable future. We emphasize, however, that if it were not for our determination that PNPC has priority under the permit we would give WPPSS further opportunity to show its need for power and its ability to finance, so that it might show that its project was "equally well adapted" within the meaning of Section 7(a).

On financing, briefly PNPC would raise the necessary funds by selling equity for 15 percent of the capitalization to the organizing companies and floating a public bond issue for the remaining 85 percent of the capitalization. While the high debt ratio has been questioned, a higher ratio has been employed for other power generating projects.[34] The combined capital ratio of PNPC and its sponsor companies using their capitalization as of December 31, 1960, would be 65.48 percent for long-term debt, 4.35 percent for preferred stock, 26.86 percent for common equity, and 3.31 percent for deferred Federal income taxes. The record supports the saleability of PNPC's bonds, and no question has been raised as to the ability of the sponsor companies to finance their participation in the proposed project. We agree, however, with the recommendation of the staff that any PNPC license be conditioned so as to require submission of a complete plan of financing prior to the beginning of construction. WPPSS on its part would finance its project through bonds.

C. Restraint of Trade

WPPSS argues that PNPC is a combination in restraint of trade citing Section 10(h) of the Power Act which provides as follows:

> That combinations, agreements, arrangements or understandings, express or implied, to limit the output

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[34] *Ohio Valley Electric Corporation, et al.*, 36 S.E.C. 304; see *South Carolina Generating Co.*, 16 FPC 52, 61.

of electrical energy, to restrain trade, or to fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

WPPSS argues that PNPC is a combination of utilities to monopolize for themselves the largest remaining power site on the Snake River, and to deprive all other competing public utilities of access to the power, and this would lead to control over the entire economy of the Pacific Northwest. It also says that the four PNPC companies will fix prices for power, on the theory that they are guaranteed a 6 percent dividend on their capital contributions, and this will put a floor under the prices of [sic] PNPC must charge. WPPSS also sees a violation of Sections 1 and 2 of the Sherman Act[35] in the allocation of fixed portions of the power generated to each of the four organizing companies. However, we agree with the examiner that there is no support in the record that PNPC or the four companies will be in violation of Section 10(h) or the anti-trust laws.

PNPC's proposal is based upon a normal business need to obtain a supply of power, and this will be accomplished by the issuance of a license by a governmental body. It is true PNPC and its component utility companies are not exempt from the anti-trust laws. Immunity from the anti-trust laws is not lightly implied. *California* v. *F.P.C.*, 369 U.S. 482, 485. However, the anti-trust laws do apply differently to regulated companies. See *F.C.C.* v. *RCA Communications, Inc.*, 346 U.S. 86, 93. Utilities are necessarily monopolies within their areas whether they be telephone companies, power companies or gas pipelines, but there is nothing to show that PNPC is trying to monopolize the sources of power in the Pacific Northwest. Of course, it seeks to gain control over the HMS site, but this type of control is inherent in licenses issued under the Act and was clearly intended by Congress.

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[35] 15 U.S.C. §§ 1 and 2.

There is here no price fixing combination, for each company will fix its own prices subject to regulatory control. The four companies have entered into an arrangement to pay the costs of their supply affiliate, PNPC, and to receive a dividend on their capital contributions. Such an arrangement is, of course, subject to our regulatory control under the Federal Power Act. *Pennsylvania Water Power Co.* v. *F.P.C.*, 343 U.S. 414; *Safe Harbor Water Power Corporation* v. *F.P.C.* 179 F. 2d 179 (CA3) certiorari denied 339 U.S. 957. These companies are not competitors in the industrial sense, and in our view this method of obtaining a supply of power was reasonable particularly in view of the enormous costs involved. There is no "public policy that forbids, *per se*, an expansion of facilities of an existing company to meet the needs of new markets * * *." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 526.

Likewise, the division of the power between the four companies is not in violation of Section 10(h) or the anti-trust laws. This is a joint venture to obtain a supply of electric energy. We have here a business requirement and no attempt to monopolize (*United States* v. *Columbia Steel Co., supra* at p. 527), although, of course, PNPC is seeking control of the HMS site in accordance with the Power Act.

D. *Federal Development*

Whether we should recommend federal development rather than development by PNPC is an important issue. We think this issue must be resolved against federal development contrary to the arguments of the Secretary of the Interior. The applicable Section 7(b) of the Power Act provides as follows:

> Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause

to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. [41 Stat. 1067; 49 Stat. 842; 16 U.S.C. 800]

We agree with our staff and the exaimner that the record supports no reason why federal development should be superior to development by PNPC, and we see no reason why we should withhold a license and recommend that the United States build the project.

While we have extensive material before us on the position of the Secretary of the Interior, there is no evidence in the record presented by him to support his position. The Secretary contends initially that we are in effect bound to a decision in favor of federal development, because Congress has made a determination that the water resource (i.e., the Columbia and Snake Rivers) should be federally developed to the extent of nine-run-of-river dams downstream and that the development of the large storage at HMS affects this federal development. We agree, of course, that in meeting our responsibilities under Section 7(b) we should consider the past history of a river basin as it sheds light on the future. While it is true that there are nine federal projects, authorized or constructed on the Snake and Columbia Rivers downstream from the projects here proposed,[36] it is also relevant that we have previously authorized major non-government projects on the main stem of the Columbia above the confluence with the Snake[37] and on the Snake above the HMS site.[38]

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[36] Bonneville, The Dalles, John Day, McNary, Ice Harbor, Lower Monumental, Little Goose, Lower Granite, and Asotin.

[37] See *e.g.*, Priest Rapids, Wanapum, Rock Island, Rocky Reach, Wells.

[38] The Brownlee, Oxbow and Hells Canyon developments of the Idaho Power Company.

The fact that the Congress from time to time has authorized considerable federal development within this expansive river basin does not compel a determination that federal development is appropriate with respect to all projects on the river. Our decision must rest upon an evaluation of all the factors relevant to the development on this reach of the Snake at this time.

The factors argued by the Secretary in support of federal development are that federal development offers lower costs, that flood control can be better effected by flexible federal operation than by limitations written into the license, that the Interior Department can better prevent damage to fish than provisions in the license and inadequate supervision by us, that federal development can better provide recreational facilities for an expanding population, and that full co-ordination of the Northwest Power Pool is possible only if the United States constructs and operates the project. He adds that immediate construction of the project would produce an excess of power in the Pacific Northwest which would cause large losses to BPA and severe harm to the economy of the region.

Cost savings to consumers at the expense of the taxpayers of the country at large may, of course, follow from federal development as a result of low cost financing and absence of tax obligations. If this possibility were the criterion, it would be our duty to recommend federal development in almost all cases. Obviously the Federal Power Act does not contemplate any such result.

While flood control (in the event of Canadian storage) and navigation are objectives of lesser significance relative to the proposed projects, provisions in a license with respect to these matters were recommended by the Chief of Engineers, United States Army, were included by the examiner in his recommended decision and will be included substantially here. The proposed project will provide substantial recreational opportunities. In accordance with

recommendations made by the Assistant Secretary of Agriculture we shall provide, as did the examiner, that the licensee shall co-operate with local, state and federal agencies in the study and preparation of a recreation public use plan and that such a plan be filed for approval by the Commission. In addition, Article 17 places an affirmative obligation upon the licensee to construct and operate such recreational facilities as may be necessary and desirable.

As for the fish problem we shall provide, as did the examiner, that the licensee shall construct protective devices and modify the project works and operations as we may prescribe hereafter upon our own motion or upon the recommendation of the Secretary of the Interior or the state conservation agencies. We shall also provide that should the United States desire to construct fish handling facilities, the licensee shall permit the United States to use its property free of cost. We see nothing to lead us to believe that the Federal Government could do more. Specifically, there is nothing in this record to indicate that the purposes described above will not be served as adequately under the license conditions as would be the case under federal development.

The Secretary of the Interior puts considerable stress on the factor of coordination arguing that a federal project would be better co-ordinated with other federal projects downstream. We agree that the Secretary (or any single operator) normally would have a superior ability to coordinate the operations of HMS with the other affected projects on the river. But there is no evidence upon which we can determine the scope or the seriousness of this matter in the context of a river system which already has a number of different project operators and an existing coordination system, i.e., the Northwest Power Pool.[39] The

[39] This Pool is a voluntary arrangement among utilities, both public and private in the Pacific Northwest area, including BPA for the co-ordination and operation of their affected systems.

parties comprising PNPC are among those having projects on the river. They are members of the Pool and their record of cooperation is good. PNPC has designed its project to be operated and co-ordinated with the Northwest Power Pool in order to benefit all members. To implement this co-ordination and operation we shall use a provision substantially as found in the Wells Project license[40] as requested by both PNPC and the staff, to provide that the licensee shall operate the project in complete co-ordination with the Northwest Power Pool. We have continuing jurisdiction and will insist that this be done. The record does not show that federal ownership is necessary to achieve this result or that proper co-ordination would not be achieved in the absence of federal development.

In short, on the basis of the record here, plus such information of which we can take official notice, there is little if anything which would persuade us that federal development of HMS was inherently superior to licensing it to PNPC even assuming that the actual choice we had before us was between federal construction now and non-federal construction now. But these are not the true alternatives. The Department of Interior has frankly admitted it has no present intention of seeking authorization to commence construction or planning to construct an HMS project. Under these circumstances, federal construction of an HMS project is not foreseeable even assuming Congress would be willing to authorize a federal project where PNPC is willing and eager to construct it under the terms, conditions and provisions of the Federal Power Act.

One of the principal reasons for the Department's opposition to non-federal construction appears to be its concern over a decline in BPA revenues which it feels might be accelerated if HMS power were made available directly or indirectly to some of its existing customers. As indicated

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[40] Public Utility District No. 2 of Douglas County, Washington, Project No. 2149, 28 FPC 128, 133.

above, however, we are convinced that PNPC specifically will have a need for the additional power which could be made available by early construction of HMS, and the Pacific and the West Coast areas, in general, will have a need for the power at the time HMS will be completed. In summary, the delay inherent in federal construction would foreclose power coming on the line at a time when it will be required. This disadvantage outweighs those benefits which Interior contends would result from federal construction (i.e., superior co-ordination and non-power benefits discussed above), assuming *arguendo*, that such benefits would be realized.

To conclude, Section 7(b) of the Act provides for federal construction where, in our judgment, there is some good reason showing that the development of any water resource for public purposes should be undertaken by the United States. HMS is principally a power project. Neither the record nor our general knowledge of the Columbia River System discloses any major benefits which would result from federal construction over that by PNPC. In the event PNPC is adjudged not to have priority, it might then be necessary to re-evaluate the Secretary's proposal. This would be particularly appropriate respecting WPPSS since its fortunes are so inextricably intertwined with those of the Interior Department.

RECENT DEVELOPMENTS

On January 22, 1964, it was announced that President Johnson and Prime Minister Pearson signed an agreement under the Canadian Treaty herein referred to. This agreement provides:

1. A schedule for completion of the Canadian storage projects as follows: Duncan Lake, April 1, 1968; Arrow Lakes, April 1, 1969; and Mica, April 1, 1973.

2. The U.S. will use its best efforts to arrange a sale to a single U.S. purchaser of the downstream power benefits for a 30 year period after completion of each project.

3. The total downstream benefits are initially 2,800,000 kws of dependable capacity and about 4 billion kw hours of energy annually.

4. These power benefits will have declined to about 660,000 kw annual dependable capacity and about 4 billion kw hours of energy annually at the end of 30 years.

5. The U.S.[41] and Canada will share equally in the power benefits described above.

6. It is contemplated that the purchaser of the Canadian entitlement will be a non-profit organization now being formed in the U.S. by certain public and private utilities in the Pacific Northwest.

Implementation of this agreement will significantly reduce the superiority of Nez Perce over HMS for flood control purposes as described here in pages 7, 14, and 20 *supra*. In addition, this agreement will substantially add to the power resources of the Pacific Northwest. Nevertheless, there is nothing which presently indicates that this new supply of power obviates the feasibility of licensing the HMS project to PNPC at this time. Accordingly, the Commission has decided that a license should be issued, as previously determined.

The Commission further finds:

(1) The Snake River is a navigable water of the United States at least as far upstream as the upper limits of the reservoir of either the High Mountain Sheep or the Nez Perce Projects (*in re Idaho Power Company*, Project No. 1971, Opinion No. 283, 14 FPC 55, 72). The respective project works will be located on lands of the United States, and the reservoir will inundate lands of the United States.

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[41] Under the treaty BPA will have about 70 percent of the U.S. share and the owners of the non-federal base system projects will have the balance.

(2) Pacific Northwest Power Company is a private corporation organized under the laws of the State of Oregon as a wholly-owned subsidiary of four sponsoring companies, namely, The Montana Power Company, Pacific Power & Light Company, Portland General Electric Company, and Washington Water Power Company.

(3) Washington Public Power Supply System is a municipal corporation organized and operating under and by virtue of the laws of the State of Washington, for the purpose of acquiring, constructing, and operating electrical generating and transmission facilities.

(4) Pacific Northwest Power Company, on March 31, 1958, filed an application under the Federal Power Act for the proposed High Mountain Sheep Project (No. 2243), also referred to as the Middle Snake River Project, to be located at river mile 189.2 on the Snake River just above the confluence of that river and the Salmon River.

(5) Washington Public Power Supply System, on March 15, 1960, filed an application under the Federal Power Act for the proposed Nez Perce Project (No. 2273) to be located at river mile 186.2 on the Snake River just below the confluence of that river and the Salmon River.

(6) Public notice of these proceedings has been given as required by the Act.

(7) Either the High Mountain Sheep or the Nez Perce Project, whichever may be constructed, would be located in or along a navigable water of the United States and would otherwise affect the interests of interstate or foreign commerce.

(8) The Department of the Interior has requested that the Commission recommend to Congress that the High Mountain Sheep Dam should be built by the United States.

(9) Subject to the terms and conditions hereafter specified, the HMS project is best adapted to a comprehensive

plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes.

(10) PNPC has a statutory priority for its application for the High Mountain Sheep Project (No. 2243) by virtue of a preliminary permit issued by the Commission on April 8, 1955 and WPPSS is not entitled to a preference under Section 7(a) of the Federal Power Act.

(11) Subject to the terms and conditions set forth below, the plans of PNPC to develop the HMS site are best adapted to conserve and utilize in the public interest the water resources of the region, and PNPC is able to carry out such plans.

(12) The development of the HMS project should not be undertaken by the United States itself.

(13) The installed horsepower capacity for the HMS project here authorized is 1,166,700 horsepower for the purpose of computing the administrative annual charge.

(14) The amount of the annual charge to be paid under the license for the HMS Project for the purpose of reimbursing the United States for the cost of the administration of Part I of the Act is reasonable as hereinafter specified.

(15) It is desirable to reserve for future determination the amount of annual charges to be paid under a license for the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands.

The Commission orders:

(A) A license is hereby issued to PNPC (hereinafter referred to as Licensee) under Section 4(e) of the Federal Power Act for a period of 50 years, effective as of the first

day of the month in which acknowledgment of acceptance thereof is filed with the Commission by PNPC for the construction, operation and maintenance of Project No. 2243, to be known as the High Mountain Sheep project of the Snake River and its tributaries, Idaho and Oregon, affecting navigable waters of the United States and the interest of interstate or foreign commerce and lands of the United States within and outside of Wallowa, Nez Perce and Payette National Forests, subject to the terms and conditions of the Act which is incorporated herein by reference as a part of this license, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(i) The proposed project consists of: All lands constituting the project area and enclosed by the project boundary or the limits or which are otherwise defined, and/or interest in such lands necessary or appropriate for the purposes of the project, whether such lands or interest therein are owned or held by the applicant or by the United States; the general location of such project area being shown and described by certain exhibits which formed part of the application for license, or amendment thereof and which are designated and described as follows:

Exhibit	FPC No.	Showing
J	2243-1	General map of project area.
K (as amended)	2243-2 through 4, 6 through 20 and 43 (amended and revised).	Project area (tentative).

(ii) All project works consisting of a concrete arch dam approximately 670 feet high, creating a reservoir extending about 58 miles upstream to Hells Canyon tailwater (Project No. 1971) on the Snake River and about 10 miles upstream on the Imnaha River with normal water surface area of about 17,300 acres and gross storage capacity of 3,600,000 acre-feet at normal water surface elevation 1510, of which

2,250,000 acre-feet would be usable with a draw down of 173 feet; a chute-type radial-gate controlled spillway located at the right abutment; low level intakes; two outdoor type powerhouses, one on each side of the river immediately downstream of the dam, having an initial installation of five units with each turbine rated 285,000 horsepower at 550-foot head and each generator rated 175,000 kw (184,000 kva at 0.95 powerfactor); three on the (left bank) Oregon side and two units on the (right bank) Idaho side, with provisions in the plans for the addition of five similar units, two on the left bank and three on the right bank; and appurtenant electrical and mechanical facilities; the location, nature, and character of which are more specifically shown and described by the exhibits hereinbefore cited and by other exhibits which also formed a part of the application for license as amended and which are designed and described as follows:

Exhibit	FPC No.	Showing
L Sheet 30, amended and revised	2243-44	General plan.
L Sheet 31, amended and revised	2243-45	Profile and sections.
L Sheet 32, amended	2243-37	Powerhouse plans.
L Sheet 33, amended and revised	2243-46	Powerhouse cross-sections.
L Sheet 34, amended and revised	2243-47	Intake and spillway sections.
L Sheet 35, amended and revised	2243-48	Arch dam.

M: "General Description and Specifications of Equipment" regarding High Mountain Sheet project.

(iii) All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful, in connection with the project or any part thereof, whether located in or off the project area, if and to the extent that the inclusion of such property as part of the project is approved or acquiesced in by the Commission; also, all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance or operation of the project.

(B) This license is also subject to the terms and conditions set forth in revised Form L—6, November 1, 1963, entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Navigable Waters and Lands of the United States" which terms and conditions designated as Articles 1 through 37, are attached hereto and made a part hereof, except for Articles 7, 8, 9 and 15 thereof; and subject to the following special conditions set forth herein as additional articles:

Article 38. The Licensee shall commence construction of the High Mountain Sheep project within two years of the effective date of this license, shall thereafter in good faith and with due diligence prosecute such construction and shall complete the project and place it in operation within seven years from the effective date of this license.

Article 39. The Licensee shall engage at least three qualified independent consultants for the purpose of reviewing and reporting on the exploration program of the dam site, the excavation plan for the dam foundation treatment and the design of the arch dam and other major hydraulic structures. The report of the consulting engineers shall be submitted for Commission consideration not later than the date upon which design drawings (Exhibit L) for the dam structure are filed pursuant to Articles 40, 41, and 42.

Article 40. The final design of the arch dam shall be verified by an acceptable method of analysis (such as the trial load method) and reviewed by the use of structural models.

Article 41. The final design of the spillway shall be based on hydraulic model tests.

Article 42. The Licensee shall submit, in accordance with the Commission's rules and regulations, revised Exhibit L drawings for the project structures and Licensee shall not begin construction of the project works until the Commission approves the exhibit.

Article 43. The Commission reserves the right to determine at a later date what transmission facilities shall be included in this license as part of the project works.

Article 44. The Licensee shall consult with the Forest Service in determination of the centerline location of transmission lines on or affecting national forest lands and shall secure concurrence of the Forest Service to the specific location of those lines occupying lands administered by the Forest Service.

Article 45. The Licensee shall not make any claim under the authority of this license against the United States or any water users' organization claiming through the United States for any damage resulting from any future depletion in the flow of the waters of the Snake River and its tributaries for the irrigation of lands and other beneficial consumptive uses.

Article 46. The Licensee shall make available to the Idaho State College, upon further order of the Commission at the request of the Idaho State College, reasonable sums of money not to exceed $7,500 for the purpose of undertaking an archeological survey and salvage excavations prior to construction and flooding.

Article 47. The Licensee shall, in order to secure maximum recreational benefits, make every reasonable effort to maintain the water surface of the High Mountain Sheep reservoir at the highest level practicable from June 15 to September 15, of each year, as is consistent with the primary purposes of the reservoir to provide pondage for Licensee's daily, weekly, monthly or seasonal power requirements; requirements of downstream releases; and flood control.

Article 48. The Licensee shall within one year from the date of issuance of the license, file with the Commission for approval its proposed recreational use plan for the project. The plan shall be prepared after consultation

with appropriate Federal, State and local agencies, and shall include recreational improvements which may be provided by others in addition to the improvements the Licensee plans to provide.

Article 49. The road or roads constructed, owned or controlled by the Licensee for the project developments, shall be made available without charge to the Forest Service, its timber operators, permittees, and other users, for the orderly administration, development, and protection of the national forests involved, and for operations necessary and incident to project development, provided that such use may be limited by reasonable safety and traffic control requirements. In appropriate circumstances and as agreed to by the Forest Service, the Licensee may require payment of the user to cover a fair share of the road maintenance costs.

Article 50. The Licensee shall, prior to impounding water, clear all lands in the bottom and margins of the reservoir between a plane five feet below ultimate low-water elevation (El. 1337) of the reservoir and the plane at normal pool elevation of the reservoir, and shall cut all brush and trees below the lower plane so that none protrude above elevation 1332. The Licensee shall clear and keep clear to an adequate width lands of the United States along open conduits; and shall dispose of all temporary structures, unused timber, brush, refuse, or inflammable material resulting from the clearing of the lands or from the construction and maintenance of the project works. In addition, all trees along the margin of the reservoir which may die due to operation of the reservoir shall be removed. The clearing of the lands and the disposal of the material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission.

Article 51. In the interests of flood control downstream from the project, the Licensee shall operate the project in accordance with an agreement to be entered into by the

Licensee and the United States Corps of Engineers for the purpose of determining detailed operating procedures for use during flood periods, in accordance with the following principles:

a. The total live storage space of about 2,250,000 acre-feet between elevation 1337 and elevation 1510 mean sea level will be made available for flood control use if and as required.

b. The reservoir level will be no higher than elevation 1475 by 1 March each year to provide about 600,000 acre-feet of storage space for flood control use at that time each year. Additional storage space will be made available between 1 March and the beginning of the flood period to insure the availability on 1 May of the total capacity needed for flood control as estimated by the Corps of Engineers.

c. The space made available as set forth above will be retained until capture of flood flows is requested by the Corps of Engineers, subject to involuntary storage as may be required due to excess of inflows over outlet capacity, or until refilling is authorized by the Corps of Engineers. In the event of involuntary storage during flood control operations, full storage capability will be regained as soon as possible.

d. During the flood storage period controlled outflows will be as warranted by the flood control requirements as determined by the Corps of Engineers with due regard to the requirements for the optimum multiple purpose operations of the project. When the Columbia River discharge at The Dalles is 600,000 cfs or higher the daily outflow may be reduced to a minimum of 10,000 acre-feet; except that during years of severe flood conditions the daily outflow may be reduced to a minimum of 4,000 acre-feet; below 600,000 cfs discharge at The Dalles, the outflow will be determined with due consideration given to all purposes of the project.

e. A discharge capacity of 65,000 cfs at minimum pool elevation 1382 is to be provided by the Licensee. This discharge capacity is based on the gated outlet capacity plus one half of the ultimate turbine hydraulic capacity.

The agreement will be subject to review from time to time as requested by the Licensee or the Corps of Engineers.

Article 52. In the interest of navigation the project shall be operated in accordance with the following requirements:

a. Minimum flow of not less than 13,000 cfs will be maintained at Lime Point, Idaho, during annual storage refill season when determined to be required by the Corps of Engineers in the interest of navigation. Flows of up to 16,500 cfs may be required at other times when determined by the Corps of Engineers to be necessary in the interest of navigation.

b. River fluctuations in the reach between Lewiston and Lime Point resulting from project operation shall not exceed a rate of one and a half feet per hour on the rising stage, and one foot per hour on the falling stage unless otherwise approved by the Corps of Engineers.

Article 53. The Licensee shall, for the conservation, and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance and operation of such facilities and comply with such reasonable modifications of the project structures and operation as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior, the Oregon State Game Commission, the Fish Commission of Oregon, or the Idaho Department of Fish and Game, after notice and opportunity for hearing and upon findings based on substantial evidence that such facilities and modifications are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the provisions of the Act.

Article 54. The Licensee shall prior to beginning of operation of the Low Hells Canyon development of Project No. 1971, enter into an agreement with the Idaho Power Company, Licensee for Project No. 1971, to compensate that Company for backwater effect on the Low Hells Canyon development of Project No. 1971 constructed in accordance with plans approved by the Commission, resulting from the operation of the High Mountain Sheep project with maximum normal pool at elevation 1510 feet at the High Mountain Sheep dam. In the event no satisfactory agreement is concluded by such time, then upon the application of the Idaho Power Company, the Commission shall fix and determine the compensation to be made by Licensee for such encroachment after notice and opportunity for hearing.

Article 55. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of its upstream and downstream fish passage and handling facilities with those for Project No. 1971 of Idaho Power Company, as the Commission may direct upon recommendation of the Secretary of the Interior, the Oregon State Game Commission, the Fish Commission of Oregon, or the Idaho Department of Fish and Game.

Article 56. The Licensee shall pay to the United States the following annual charges:

a. For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, a reasonable annual charge in accordance with the provisions of Part 11 of the Commission's regulations. The authorized installed capacity for such purposes is 1,166,700 horsepower;

b. For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands exclusive of those used for transmission-line purposes an amount to be fixed hereafter by the Commission; and

c. For the purpose of recompensing the United States for the use, occupancy and enjoyment of its lands for transmission-line purposes an amount to be fixed hereafter by the Commission.

(C) The exhibits described in paragraph (A) above are approved as part of the license for the project.

(D) The Licensee shall within one year from the effective date of the license, file with the Commission a plan of financing for Commission approval, and the Commission reserves the right to require such additional information as it may deem necessary before taking final action on the plan of financing. The Licensee shall not commence construction prior to Commission approval of a plan for financing the project.

(E) This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this license. In acknowledgment of the acceptance of this license, it shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

(F) The motion filed by WPPSS on September 12, 1961, for leave to conform its pleadings to the evidence is hereby granted.

(G) The application of WPPSS for license for Project No. 2273 is hereby denied.

(H) The request of the Secretary of the Interior that Federal development be recommended is hereby denied.

(I) The examiner's opinion and findings are hereby adopted as part hereof to the extent not inconsistent herewith.

(J) Exceptions not granted are hereby denied.

CHAIRMAN SWIDLER *dissenting* filed a separate statement appended hereto, at page 291.†

COMMISSIONER BLACK *dissenting* filed a separate statement appended hereto, at page 305.*

Form L-6 (Revised November 1, 1963)

TERMS AND CONDITIONS OF LICENSE FOR UNCONSTRUCTED MAJOR PROJECT AFFECTING NAVIGABLE WATERS AND LANDS OF THE UNITED STATES

Article 1. The entire project, as described in the order of the Commission, shall be subject to all the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: Provided, however, that if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval amended, supplemental, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. Said project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as charged in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works under the license without the prior approval of the Commission; and any emergency

† [Page reference is to official opinion. See p. 100a, *infra.*]
* [Page reference is to official opinion. See p. 128a, *infra.*]

alteration or addition so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in the project works or divergence from such approved exhibits may be made if such changes will not result in decrease in efficiency, in material increase in cost, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may from time to time prescribe for the protection of life, health, or property.

Article 4. The construction, operation, and maintenance of the project and any work incident to additions or alterations, whether or not conducted upon lands of the United States, shall be subject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall furnish to said representative such information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, and as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow him and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties.

Article 5. Insofar as any material is dredged or excavated in the prosecution of any work authorized under the

license, or in the maintenance of the project, such material shall be removed and deposited so it will not interfere with navigation, and will be to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

Article 6. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of water affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

Article 7. Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and its rights-of-way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete and maintain such navigation facilities.

Article 8. The Licensee shall furnish free of cost to the United States power for the operation and maintenance of navigation facilities at the voltage and frequency required

by such facilities and at a point adjacent thereto whether said facilities are constructed by the Licensee or by the United States.

Article 9. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army.

Article 10. The Licensee shall for the protection of navigation, construct, maintain and operate at its own expense such lights and other signals on fixed structures in or over navigable waters of the United States as may be directed by the Secretary of the Department in which the Coast Guard is operating.

Article 11. The actual legitimate original cost of the original project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Act and the Commission's rules and regulations thereunder.

Article 12. After the first twenty (20) years of operation of the project under the license, six (6) percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings of the project for the establishment and maintenance of amortization reserves, pursuant to Section 10(d) of the Act; one-half of the project surplus earnings, if any, accumulated after the first twenty years of operation under the license, in excess of six (6) percent per annum on the net investment, shall be set aside in a project amortization reserve account as of the end of each fiscal year, provided that, if and to the extent that there is a deficiency of project earnings below six (6) percent per annum for any fiscal

year or years after the first twenty years of operation under the license, the amount of such deficiency shall be deducted from the amount of any surplus earnings accumulated thereafter until absorbed, and one-half of the remaining surplus earnings, if any, thus cumulatively computed, shall be set aside in the project amortization reserve account; and the amounts thus established in the project amortization reserve account shall be maintained therein until further order of the Commission.

Article 13. The Licensee shall install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so, after notice and opportunity for hearing.

Article 14. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 15. The Licensee shall, for the conservation, and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance and operation of such facilities, and comply with such reasonable modifications of the project structures and operation as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing and upon findings based on substantial evidence that such facilities and modifications are necessary and desirable, reasonably consistent with the primary purpose of the project, and consistent with the provisions of the Act.

Article 16. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of Licensee's lands and interest in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be prescribed by the Commission, reasonably consistent with the primary purpose of the project, in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 17. The Licensee shall construct, maintain and operate or shall arrange for the construction, maintenance and operation of such recreational facilities including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities and utilities, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal and State agencies, after notice and opportunity for hearing and upon findings based upon substantial evidence that such facilities are necessary and desirable, and reasonably consistent with the primary purpose of the project.

Article 18. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the pur-

pose of full public utilization of such lands and waters for navigation and recreational purposes, including fish and hunting, and shall allow to a reasonable extent for such purposes the construction of access roads, wharves, landings, and other facilities on its lands the occupancy of which may in appropriate circumstances be subject to payment of rent to the Licensee in a reasonable amount: Provided, that the Licensee may reserve from public access, such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property and Provided further, that the Licensee's consent to the construction of access roads, wharves, landings, and other facilities shall not, without its express agreement, place upon the Licensee any obligation to construct or maintain such facilities. These facilities are in addition to the facilities that the Licensee may construct and maintain as required by the license.

Article 19. The Licensee shall be responsible for and shall minimize soil erosion and siltation on lands adjacent to the stream resulting from construction and operation of the project. The Commission upon request, or upon its own motion, may order the Licensee to construct and maintain such preventive works to accomplish this purpose and to revegetate exposed soil surface as the Commission may find to be necessary after notice and opportunity for hearing.

Article 20. No lease of the project or any part thereof whereby the lessee is granted the occupancy, possession, or use of the project, or any part thereof, shall be made without prior written approval of the Commission; and the Commission may, if in its judgment the situation warrants, require that all the conditions of the license, of the Act, and of the rules and regulations of the Commission shall be applicable to such property so leased to the same extent as if the lessee were the Licensee: Provided, that the provisions of this article shall not apply to leases of land or

buildings or other property while not required to achieve the purposes of the license.

Article 21. Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised maps, plans, specifications, and statements insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the maps, plans, specifications, and statements approved by the Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variations in or divergence from the approved maps, plans, specifications, and statements. Such revised maps, plans, specifications, and statement shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 22. In the construction and maintenance of the project, the location and standards of roads and trails, and other land uses, including the location and condition of quarries, borrow pits, spoil disposal areas, and sanitary facilities, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 23. In the construction and maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines, and telegraph, telephone, and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling and obstructing traffic and endangering life

on highways, streets, or railroads. None of the provisions of this article is intended to relieve the Licensee from any responsibility or requirement which may be imposed by the other lawful authority for avoiding or eliminating inductive interference.

Article 24. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive interference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 25. The Licensee shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission line; shall cut and remove all dead or leaning trees which might fall in contact with the transmission line; and shall take such other precautions against fire as may be required by such officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 26. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance of the project works or in the clearing of said lands shall be paid for in accordance with the requirements of and at the current stumpage rates applicable to the sale of similar timber by the agency of the United States having jurisdic-

tion over said lands; and all slash and debris resulting from the cutting or destruction of such timber shall be disposed of as the officer of such agency may direct.

Article 27. The Licensee shall do everything reasonably within its power and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon request of officers of the agency of the United States concerned, to prevent, make advanced preparations for suppression, and suppress fires on lands occupied under the license.

Article 28. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or to the use by said parties of water for sanitary and domestic purposes from any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 29. The Licensee shall be liable for injury to, or destruction of, any buildings, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 30. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be

constructed on, through and across the project lands, conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other means of transportation and communications not inconsistent with the enjoyment of said lands by the Licensee for the purposes stated in the license. This article shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 31. There is reserved to the appropriate department or agency of the United States, or of the State or county involved, the right to take over, maintain, and supervise the use of any project road as a public road after construction of the project works is completed.

Article 32. The Licensee, its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties necessary or useful to the project and to the development, transmission, and distribution of power therefrom will be voluntarily sold, transferred, abandoned, or otherwise disposed of without the approval of the Commission: Provided, that a mortgage or trust deed or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article. In the event the project is taken over by the United States upon the termination of the license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, the Licensee, its successors and assigns will be responsible for and will make good any defect of title to or of right of user in any of such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge, or will assume responsibility for

payment and discharge, of all liens or encumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license: Provided, that the provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear, or to require the Licensee, for the purpose of transferring the project to the United States or to a new Licensee, to acquire any different title to or right of user in any of such project property than was necessary to acquire for its own purposes as Licensee.

Article 33. For the purpose of determining the stage and flow of the stream or streams from which water is diverted for the operation of the project works, the amount of water held in and withdrawn from storage, and the effective head on the turbines, the Licensee shall install and thereafter maintain such gages and stream-gaging stations as the Commission may deem necessary and best adapted to the requirements; and shall provide for the required readings of such gages and for the adequate rating of such stations. The Licensee shall also install and maintain standard meters adequate for the determination of the amount of electric energy generated by said project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission and may be altered from time to time if necessary to secure adequate determinations, but such alteration shall not be made except with the approval of the Commission or upon the specific direction of the Commission. The installation of gages, the ratings of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of said project, and the Licensee shall advance to the Uinted States

Geological Survey the amount of funds estimated to be necessary for such supervision or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient record of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 34. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without replacement, or shall abandon or discontinue good faith operation of the project for a period of three years, or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address to the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license, and not less than 90 days after public notice may in its discretion terminate the license.

Article 35. Upon abandonment of the project the Licensee shall remove all buildings, equipment and power lines from lands of the United States and restore said lands to a condition satisfactory to agency having jurisdiction over the lands and shall fulfill such other obligations under the license as the Commission may prescribe.

Article 36. The right of the Licensee and of its transferees and successors to use or occupy navigable waters or lands of the United States under the license for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless a new license is issued pursuant to the then existing laws and regulations.

Article 37. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

APPENDIX A

* * * * *

[The map printed in the Commission's opinion at this location is omitted. It is identical to the map used by the Court of Appeals in its decision, except that the Commission did not locate the sites of the Low Mountain Sheep and Pleasant Valley Dams. See map in Court of Appeals decision, Appendix A, p. 7a, *supra.*]

SWIDLER, Chairman, *dissenting:*

I dissent from the Commission's action in granting a license for the High Mountain Sheep Project to the Pacific Northwest Power Company, because the Commission has rejected the command of Section 7(a) of the Act to grant WPPSS a preference. This dissent is limited to that single question; I accept the result reached by the majority on the question whether the High Mountain Sheep Project or the competing Nez Perce Development is "best adapted to a comprehensive plan" of development for the Upper Snake River. I do not dissent on this phase of the case despite the superiority of Nez Perce as a hydroelectric development because on this record it is improbable that the anadromous fish runs on the Salmon River could be preserved if Nez Perce were constructed. This fact is crucial inasmuch as the applicants have not attempted to carry the burden of demonstrating, and the record does not demonstrate, that it would be in the public interest to approve Nez Perce at the cost of the destruction of the anadromous fish runs.

I

The Preference Clause of the Federal Power Act Requires that a License Be Granted to WPPSS

In my judgment section 7(a) of the Federal Power Act, the preference clause, requires the Commission to award a license in this case to WPPSS, a preference applicant. I consider this to be the plain meaning of the words used by the Congress in section 7(a).

Section 7(a) provides as follows:

> In issuing * * * licenses where no preliminary permit has been issued * * * the Commission *shall* give

> preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; * * * [Emphasis supplied.]

The command is flat. The preference accorded WPPSS by the statute is mandatory and is qualified by only one exception, the case in which another applicant has obtained a prior preliminary permit pursuant to sections 4(f) and 5 for the particular project for which it seeks a license.

Before discussing the Commission's reasoning in support of its attempt to bring PNPC within the one narrow exception to the preference clause, it will be instructive to examine the legislative history of the Act in order to appreciate the importance which Congress placed on its mandate to the Commission to comply with the provisions for a preference to public agencies.

If the language left any doubt, the legislative history shows that section 7(a) was designated to cover precisely the case before us. Rarely has Congress visualized with such prescience the possibility that the administrators of a statute would attempt to frustrate the Congressional intent, and been at such pains to make clear what it meant. Indeed the Congressional intent that the preference applicant be licensed in the circumstances of this case would hardly have been clearer if Congress itself had designated it as the licensee by name. The Commission's decision is therefore particularly egregious and unfortunate.

The Federal Water Power Act was finally passed in 1920, after more than a decade of abortive attempts to pass an effective Act dealing with the water resources of the country.[1] The idea of giving a preference to municipalities

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[1] The history of water power legislation through June 24, 1919, is set forth in House Report No. 61, accompanying H.R. 3184, June 24, 1919, Committee on Water Power, 66th Congress, 1st Session, p. 2, *et seq.*

or other state agencies—which has become a standard feature of Federal water resource development legislation—appeared in the history of water power legislation as early as 1914, in H.R. 16673 (Ferris Bill No. 1), which passed the House on August 24, 1914, but failed in the Senate.

The early prototypes of the Water Power Act of 1920 framed the preference provision in discretionary terms, empowering but not requiring the Commission to give preference to public bodies.[2] As finally enacted the discretionary language was eliminated and instead the law states that the Commission "shall" give preference.

During the hearings before the House Committee on Water Power on the Administration-backed water power bills, the idea of a mandatory preference was first broached by Congressman (later Senator and Vice President) Alben W. Barkley who offered an amendment to section 7 to require that preference "shall" be given, saying:

> • • • what we want is to get section 7 amended so as not to provide that this Commission *may* give preferences to municipalities, but that they *shall* give preference to municipalities whenever the conditions are equal or similar.[3] [Emphasis supplied.]

The bill that emerged from Committee did not contain Mr. Barkley's amendment, still leaving the granting of preference within the discretion of the Commission.

When the bill was debated in the House, Mr. Doremus offered an amendment to the first paragraph of section 7

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[2] *e.g.*, H.R. 16673, 63rd Cong., 2d Session (for text see H. Rept. 842, June 16, 1914, 63rd Cong., 2d Session); S. 1419, 65th Cong., 2d Sess. (See Exhibits A & B in H. Rept. No. 715, 65th Cong., 2d Sess.)

[3] Hearings before the House Committee on Water Power, House of Representatives, Parts 1-4, 65th Cong., 2d Sess., 1918, p. 814.

(italic words are additions; words in small caps are deletions):

> That in issuing preliminary permits or licenses hereunder the commission MAY IN ITS DISCRETION *shall* give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission TO BE BEST *as well* adapted to conserve and utilize in the public interest the navigation and water resources of the region *as the plans of other applicants;* * * * (56 Cong. Rec. 9775).

Mr. Doremus made it clear, in response to a question by Mr. Welsh, that his amendment:

> * * * makes it *mandatory* upon the commission to grant the license to the State or municipality, if the plans submitted by it are, in the judgment of the commission, as good as those submitted by the private applicant. [Emphasis supplied.] (56 Cong. Rec. 9804.)

The amendment was then modified further, by eliminating the words "as well," and the last words, "as the plans of other applicants." (56 Cong. Rec. 9805.) It was then passed by the House. As passed, it read as follows:

> That in issuing preliminary permits or licenses hereunder the commission shall give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission adapted to conserve and utilize in the public interest the navigation and water resources of the region.

Thus, the amendment originally proposed by Congressman Barkley in the House Hearings was accepted and, as we know, eventually became a part of the Act. In the Senate, the change of the words "may in its discretion" to "shall" was made without discussion (59 Cong. Rec. 1532).

Under the terms of section 7 as originally proposed a preference applicant was entitled to a preference if its plans as initially submitted "are deemed by the Commission equally well adapted * * * to conserve and utilize in the public interest the water resources of the region." But the Congress went even further to make the preference for municipalities meaningful and effective.

It was during the concluding debates of the Congress on the Federal Water Power Act that the words "or shall within a reasonable time to be fixed by the Commission be made equally well adapted" were added to section 7. The amendment was sponsored by Mr. Sinnott in the House of Representatives, and his reasons for introducing it are directly in point:

> Mr. Chairman, * * * I do not want to see a municipality foreclosed and concluded in case its plan is not as good as some other plan. I think if the municipality or the State is willing to amend or modify the plan first filed by it and make that plan as good as the other plan filed, that it should have that opportunity, and my amendment seeks to give the municipality that opportunity to modify and amend its plan and make it as good and as efficient as any other plan filed. (58 Cong. Rec. 2037-2038.)

Mr. Sinnott's amendment passed, emerged as part of section 7 of the Federal Water Power Act, and remains in the present Act.

The Commission, while not basing its holding on this point, apparently was influenced by its conclusion that WPPSS does not have as great a present need for the power from HMS as does PNPC and that WPPSS could not market all of the power to public agencies until "some indefinite time after 1970." Even if we assume that the "equally well adapted" requirement applies to WPPSS's marketing plans, in itself a doubtful interpretation, the

legislative history makes plain that WPPSS need not show an immediate market to preference customers for all of the HMS power. In fact, such a requirement was expressly rejected by the Congress.

After Mr. Sinnott's amendment to section 7 passed, an amendment was offered to limit the preference for municipalities and States to "the extent such power is to be used by such States and municipalities for State or municipal purposes." (58 Cong. Rec. 2039.) This amendment was defeated by the House after Mr. Sims, with a remarkable understanding of the future growth in the demand for electricity, stated in opposition:

> The gentleman's amendment would prevent a city or town from applying for a license and developing water power unless the city at the time it applied for it had need, for purely municipal purposes, for the whole amount of power to be developed. All cities are growing. Suppose here is a city that has a population of 100,000. There is a water-power site within reach of the city of 100,000 population, and it will produce power fully developed for a city of 200,000. Now the gentleman's amendment would prevent that city from receiving a permit or making application—would prevent it from having an opportunity to develop the site—unless it can use the whole output for immediate municipal purposes.
>
> * * * * * * * * *
>
> These things were well studied in the committee, as the gentlemen knows, and our intention was in every case to give the State or municipality preference for a permit and license and without charge to the extent of the power used for State or municipal purposes. To deny a license unless the city or municipality or State shall couple with it that it will develop only to the extent it may be needed for muncipal purposes is vicious and wrong in principle. (58 Cong. Rec. 2039-40.)

The example used by Congressman Sims in speaking against the amendment to limit the preference is analogous to the case at hand. WPPSS has proven with reasonable certitude that it will develop a market among its members and other supporting public and cooperative agencies during the 1970's for the power that would be produced by the Nez Perce project.[4] *A fortiori* this market would absorb the output of the smaller HMS project. It has also been shown that there is likely to be a regional market for this output, both prior to and during the 1970's, no matter who is operating the project, and WPPSS is essentially a regional power supplier. The situation is essentially that which Congressman Sims posited of a preference agency which can ultimately, if not immediately, be expected to consume the entire output of a site. The case for WPPSS then falls squarely within the boundaries of a clearly articulated Congressional intent.

A portion of Mr. Sinnott's statement in support of his proposed amendment to section 7 bears repeating at this point:

> • • • I do not want to see a municipality foreclosed and concluded in case its plan is not as good as some other plan. I think if the municipality or the State is willing to amend or modify the plan first filed by it and make that plan as good as the other plan filed, that it should have that opportunity, and my amendment seeks to give the municipality that opportunity • • •

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[4] The options and commitments held by WPPSS represent a total estimated average load in 1971 according to WPPSS of 1992 megawatts or, according to PNPC's claim, of 1324 megawatts, and in ten year's time these loads can be expected to approximately double. Estimated dependable capacity for Nez Perce is approximately 1850 mw; for PNPC's–HMS project, 930 mw; and for the WPPSS–HMS project, 1218 mw.

The growth in the loads of the public agencies on either basis can thus absorb the output of the HMS project in the next decade.

Mr. Sinnott's amendment was adopted.

The legislative history thus demonstrates that Congress intended no loophole in providing that a municipality which has a preference over a competing non-preference applicant must be given a preference and also afforded reasonable time to make its plans equally well adapted to conserve and utilize the water resources in the public interest. Even the opponents of section 7 were aware of the implications of of the section. As Senator Phipps stated in the Senate debate (59 Cong. Rec. 1173):

> * * * under the provisions of the bill [a] municipality can look over the ground and file on it, either the same or, as they may think, a better plan and secure the permit, to the disadvantage of the one who first discovered the possibilities of the stream.

This seemed grossly unfair to the opponents of section 7, but they lost. What they opposed came to pass and became the law. Section 7 was passed precisely to cover the situation in the case before us, and the wisdom and fairness of that Act are not here for decision. The expressed intention of the proponents of section 7, the stated fears of the opposition, as well as the clear language of the section itself, compels the conclusion that WPPSS is entitled to a license in this proceeding. To hold otherwise is to substitute our balancing of the equities for the command of Congress.

II

PNPC is not Entitled to a Priority Under its Preliminary Permit

The starting point in determining the application of the preference clause in this case is to examine its meaning in relation to the over-all scheme of the statutory provisions relating to preliminary permits. PNPC cannot overcome the preference to WPPSS unless it has a priority by

virtue of a presently effective preliminary permit for the HMS project.

Section 4(f) of the Federal Power Act authorizes the Commission to issue a preliminary permit to applicants for the purpose of securing the data necessary to support a license application for a hydroelectric project. Section 4(f) expressly requires that the Commission:

> * * * before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application * * * in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

Section 5 provides that permits shall be for the sole purpose of maintaining priority of application for a license during the period required for making preliminary examinations and surveys for a project, but not exceeding a total of three years.

The statute standing alone clearly gives the Commission discretion in granting a permit to define the scope of the grant by limiting it to a specified project. Indeed, it would seem that a definite description of the scope of the project and the limits of its boundaries was expressly contemplated by the above-quoted requirements of section 4(f) so that agencies entitled to a preference would not lose their rights without clear notice and opportunity for a hearing.

The preliminary permit is the means designated by Congress for initiating a hydroelectric license proceeding and municipalities are entitled to a preference for permits as well as for licenses. It cannot be assumed that Congress intended that the permits, which are the sole means of extinguishing their preference rights, were to be awarded in such vague and uncertain terms that preference agencies

would have no notice that their preference interest in particular locations was involved in a permit application. At any rate, the permit granted to PNPC was not vague and uncertain, but was definite and limited. The statute impels the conclusion that a permit should not be broadened beyond its terms for purposes of defeating the statutory preference to a license.

The preliminary permit on which PNPC relies had its genesis on November 9, 1954, when PNPC filed an application for a preliminary permit for Mountain Sheep and Pleasant Valley Projects on the Snake River. The cover of this application reads in pertinent part as follows:

Application for Preliminary Permit

for

Mountain Sheep Hydroelectric Project

. . .

and

Pleasant Valley Hydroelectric Project

A preliminary permit was granted to PNPC by the Commission "for the sole purpose of maintaining priority of application for a license for Project No. 2173 (Mountain Sheep-Pleasant Valley)." Upon the basis of this application and permit, PNPC now asserts a claim of priority in licensing under section 5 of the Federal Power Act[5] for an altogether different project sited at a different location, High Mountain Sheep.

The question whether PNPC can claim priority over WPPSS on the strength of this preliminary permit is a three-fold one: whether HMS was within the scope of its preliminary permit issued for the Mountain Sheep-Pleasant Valley project; whether the preliminary permit re-

[5] The text of section 5 of the Federal Power Act is set forth at p. 264. [The page reference is to the official opinion. Section 5 is printed at p. 166a, *infra*.]

mained effective after the denial of its license application for the MS-PV project and whether PNPC's license application for High Mountain Sheep was perfected within the three years statutory limit of a preliminary permit. PNPC cannot prevail unless all three questions are answered affirmatively. In my judgment all three must be answered negatively.

As recounted by the majority, PNPC applied and was issued a preliminary permit to expire April 1, 1958, for the MS and PV dams. The public notice of the preliminary permit for the project was limited to a description of the proposed MS and PV dams. There was no suggestion that the permit was to cover any other project. The Commission, on April 8, 1955, granted PNPC just exactly what it requested—a preliminary permit—"for a license for Project No. 2173 (Mountain Sheep-Pleasant Valley)."

After receiving this preliminary permit PNPC filed an application for a license covering these two dams, and after a hearing this license application was denied by the Commission on January 20, 1958. PNPC limited its studies under the permit to the two-dam development for which it had sought a license because the two-dam development avoided interferenee with salmon runs up the Imnaha River. PNPC specifically instructed its engineers to confine their investigations to sites above the mouth of the Imnaha (PNPC Brief, pp. 327-28). The reports made by PNPC to the Commission under its preliminary permit also reveal that no studies were made of the HMS site during the three-year term of the permit.

Let us assume for discussion purposes with the majority that PNPC's preliminary permit remains in effect eight and one-half years after it was issued. What is its scope? Did it in fact cover the HMS project?

I believe that plain provisions of the permit and the facts of this case make clear that the HMS project, for

which PNPC is today awarded a license, was not within the scope of the preliminary permit for Mountain Sheep-Pleasant Valley, and that PNPC cannot legitimately claim a priority right to a license for the HMS project.

It is dispositive of the whole case that PNPC never sought—indeed, that it deliberately avoided seeking—a preliminary permit for HMS. The application for preliminary permit for Mountain Sheep-Pleasant Valley Project No. 2173 specifically described the two dams in the project, giving their location and their capacity, and the permit was issued "for the sole purpose of maintaining priority of application for Project No. 2173 (as described) * * *." The preliminary permit's application to these two specific dams was made plain from the outset, as we have already noted, by the very cover of the application, as well as by every detail of the text.

HMS is a project for a single dam of different size and generating capacity and located below the mouth of the Imnaha River, in contrast to the Mountain Sheep and Pleasant Valley projects. The order issuing the preliminary permit, PNPC's studies and reports under the permit, the hearing on the initial application for license, the denial of license for Mountain Sheep-Pleasant Valley—all of these related only to the Mountain Sheep-Pleasant Valley development, to the exclusion of HMS.

It would seem to be beyond question that the priority afforded by a preliminary permit is limited to the site specified therein. As the Commission said in *Chatanika Power Co., Inc.*, Project No. 2294, 26 FPC 751 at 752.[6]

> The permit * * * represents a valuable privilege, for it prevents others from securing consideration of an application for the *particular site in question* during the term of the permit. [Emphasis supplied.]

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[6] See also *Linoma Power Co.*, 8 FPC 999 at p. 1000, cited by the majority where the Commission refers to "a particular project covered by the permit."

The *Chatanika Power Co.* case is but another application of the established rule of law that a governmental grant of a permit is to be strictly construed. As the Supreme Court stated in *Louisville Bridge Co.* v. *U.S.*, 242 U.S. 409 at p. 417 (1917):

> * * * when private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of this power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised.

In this case PNPC applied for and was granted a permit for the two specific sites and the terms of the permit were completely clear that it was limited to those sites. I do not mean to suggest that the Commission could not grant a permit with a broader scope but it is hard to imagine how a permit could state its limitations any more clearly than was done in the instant case.

I therefore conclude that the Commission never intended that the preliminary permit cover the HMS project which was completely different from Mountain Sheep and Pleasant Valley; and that in fact the preliminary permit by its terms did not include the HMS project.

This is not to say that an applicant must accurately guess in advance of exploratory engineering studies under a preliminary permit the exact results of these studies. No such impossible demands need be read into the Act. Rather, it is the applicant's responsibility to seek an amendment reflecting any significant changes in the scope of the permit which become warranted by the studies. Amendments to preliminary permits are authorized by the Commission's regulations. (Regulations under the Federal Power Act, Section 4.84.) Obviously the statutory notice requirement for the protection of preference customers would be mean-

ingless if the scope of a permit were not limited by its words and could be enlarged by unilateral action of the permittee without knowledge of other interested parties whose rights may be affected. PNPC has shown its awareness of the need for such amendments in other license proceedings (13 FPC 1656) and in the present proceeding, as reflected in a motion it made and later withdrew for a declaratory order seeking a ruling on the scope of the preliminary permit upon which it now relies.[7]

To be sure, it is desirable that an applicant be allowed flexibility and be encouraged to study all reasonable alternatives, including those not known at the time of application for a permit. The way to obtain this flexibility, however, is by allowance of needed amendments, not by construing permits which purport to cover specific projects as being in effect a charter for a broad stretch of the river, thereby concealing the scope of the permit from the public and interested preference customers.

The rule enunciated by the majority means that a permit for a particular project affords the applicant a priority over any other projects "affecting essentially the same reach of the river." Applied to this case it means that the preliminary permit to PNPC for two low dams granted it a priority over any other applicant for High Mountain Sheep or Nez Perce, both of which projects affect the same reach of the Snake River, even though both High Mountain Sheep and Nez Perce are downstream from the two low dams, flood out portions of other rivers (the Imnaha and the Salmon) and by any fair standard are different projects from the MS-PV project.

I find the majority's reasoning both mystifying and unreasonable.

The majority position is mystifying because it interprets a permit application as meaning something other than what

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[7] See page 299, *infra*. [The page reference is to the official opinion. This reference will be found on p. 115a, *infra*.]

it says. Were some compelling reason of Congressional purpose advanced in support of this transmutation, I might be persuaded, but no reason is given. The proper course for an applicant in PNPC's circumstances, as already suggested, is either to file a general description of the proposed project in its permit application which would put everyone on notice of its broad scope or to file a specific description and later seek to amend it to reflect any significant changes.

The majority's position is unreasonable because of the inadequate notice—indeed, the wholly false and misleading notice—provided by a preliminary permit under this interpretation, and the resulting failure to give potential competing applicants and other interested parties the statutory notice to which they are entitled. This is no mere academic point, as illustrated by the present proceeding. We should bear in mind that Nez Perce was a project which had already been separately identified as a desirable project by the Corps of Engineers and endorsed by many of the preference agencies in this proceeding at the time PNPC applied for the preliminary permit. It is beyond belief that the preference agencies would at that time willingly have acquiesced in the award of a preliminary permit for the Nez Perce Project or for the HMS Project for which they would have been entitled to a preference. Under the circumstances it mnst be assumed that the preference agencies would have objected to an award of a preliminary permit under Project No. 2173 if they had been aware that it covered a high dam—that is, if they had been fairly placed on notice that Nez Perce or HMS was within the contemplation of the application as originally filed. Thus, to require specificity in the application, and thereupon to construe it as covering projects not specified, would result in depriving potential preference applicants of an opportunity to preserve the preference rights guaranteed by the statute. I cannot acquiesce in an interpretation of the statute so lacking in fairness.

If the majority's view prevails, permittees may tie up the development of great stretches of our nation's waterways for a decade or more by a single permit, to the exclusion of applicants accorded an express preference by Congress.

There is a second and independent reason why PNPC may not claim a priority for the HMS project: its preliminary permit and the priority incidental thereto were by operation of law terminated upon the denial of the first license application for the MS-PV project for which the permit was granted.

A preliminary permit under the Federal Power Act is but a step in the licensing process, incidental and preliminary to the issuance or denial of a license. The permit is issued "for the sole purpose of maintaining priority of application for a license." (Sec. 5.). In legal terms, it merges in the license to which it is incidental. Once this sole purpose has been served by final Commission action on the license the preliminary permit ceases to exist.

The question of the maximum duration of the priority of a permit holder was raised early in the history of the Commission. Must the priority expire with the termination of the permit itself if the license application for the same project is still pending? This is the literal interpretation of section 5, which provides that the permit "shall be for the sole purpose of maintaining priority of application for a license * * * for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary * * * ". However, since the total time for prosecuting an application for license may exceed three years from the date of the permit, this interpretation might afford the permit applicant little practical protection in some cases. Such considerations apparently moved the Chief Counsel for the Commission to advise the Commission in an opinion, formally approved by the Commission

on April 30, 1923[8] that the priority attaches to the license application for which the permit was issued (if timely filed) and continues until the license is granted, denied or withdrawn. Under the opinion PNPC's permit expired six years ago. The majority chooses to stigmatize this as an "obscure opinion." The short answer is that the Commission adopted the opinion as its own and took the unusual step of publishing the opinion in its Third Annual Report to Congress. It was evidently regarded as a major exposition and clarification of the purposes of the statute.

The Chief Counsel's Opinion reads in part as follows:

> • • • The priority given by a preliminary permit attaches before use and before a definite application for use can be made, and subsists until application for license in proper form is filed in conformity with its requirements, or until the time which it grants for that purpose expires. When application for license, duly perfected, as required by the commission, is filed, the preliminary permit has served its purpose. The priority attaches to the application for a license and attends it until the application is withdrawn or is granted or rejected by the commission. It has no time limit, and can be lost only by withdrawal of the application having been filed by the permittee, when entitled to priority, such priority attached to the application and will continue for such time as may be used by the commission in granting or denying the application.

The twofold aspect of the Chief Counsel's opinion should be emphasized; first, that once the license application is filed pursuant to a permit, the permit merges with the license application; and second, that the priority may live beyond the term of the permit, but that its continued existence hinges upon the disposition of the license application. That

[8] Reported to Congress in the Commission's Third Annual Report to Congress (pp. 222-23).

is, once the license is denied or granted, or the application for license withdrawn, the priority has served its purpose and is terminated.

The Commission's order granting PNPC's preliminary permit provided that the permit was "for the sole purpose of maintaining priority of application for a license for Project No. 2173 [Mountain Sheep-Pleasant Valley]." By the Commission's standard of the past four decades PNPC's preliminary permit was terminated by the denial of its license application for Mountain Sheep-Pleasant Valley Project No. 2173. The only other reasonable interpretation of the language of section 5 is less favorable to PNPC and would terminate the priority with the expiration of the permit or no later than three years after filing, as was the practice prior to adoption of the 1923 Opinion by the Commission.

Another controlling question, which the majority opinion ignores, is whether PNPC's preliminary permit, regardless of its scope, remained effective after its expiration date of March 31, 1958, to afford PNPC a priority with respect to the High Mountain Sheep Project. Section 5 of the Act provides that a preliminary permit maintains "priority of application for a license * * * for such a period * * * not exceeding a total of three years * * * as * * * may be necessary for making examinations and surveys, for preparing maps, plans, * * *" needed to support the license application. Section 9 expressly requires that "each applicant for a license hereunder shall submit to the Commission—such maps, plans, specifications, and estimates of cost as may be required *for a full understanding of the proposed project.*"

The 1923 opinion of its General Counsel which the Commission adopted held that "if a permittee within the time prescribed by his permit has filed an application for a license *in proper form and accompanied by the required data,* his priority will not expire with the expiration of the

period of the permit but will continue for such time as may be used *by the Commission* in granting or denying the application." [Emphasis supplied.]

On March 31, 1958—the last day before the preliminary permit for Mountain Sheep-Pleasant Valley expired—PNPC filed what purported to be a license application for the High Mountain Sheep Project (or perhaps even Nez Perce since the application left this possibility open).

The PNPC filing of March 31, 1958, was not complete as an application for a license. In fact, on April 23, 1958, the Commission's Secretary wrote PNPC to request that it supply a variety of basic information required to be submitted with a license application, observing "that additional information and data are required for an understanding of the proposed project including the proposed project boundary." A copy of the Commission's letter of April 23, 1958, is attached hereto as Exhibit A.

The fact that PNPC's filing of March 31, 1958, for HMS did not contain sufficient information for an understanding of the project is not a mere technical deficiency in the circumstance of this case. A motion taking issue with PNPC's attempt to assert a priority for HMS or Nez Perce and moving to dismiss the application on the very ground of failure of the application to comply with the Commission's requirements was filed by the National Hells Canyon Association and the Northwest Public Power Association on April 18, 1958, a motion which the Commission has never acted upon. The motion correctly points out that the PNPC license application was incomplete and that by letter of March 11, 1958 (a copy of which is attached as Exhibit B hereto) PNPC itself had advised the Commission that it would need 10 more months in which to make a study of the High Mountain Sheep Project. Indeed it was not until after the expiration of the three-year period of the permit that PNPC made the studies to secure the information to complete its license application for HMS. It was

over 10 months later on February 23, 1959, and again on September 28, 1959, before the license application for the HMS project was amended to provide sufficient detail to proceed with the licensing process.

As the Commission pointed out in *Robert P. Wilson, et al.*, Opinion No. 364, dated October 10, 1962: "The intent of the Federal Power Act is to have applicants act diligently and complete all the necessary investigations during the period of the preliminary permit." [28 FPC 571 at 573]

In my judgment, the facts of this case make it clear that PNPC did not "complete all the necessary investigations during the period of the permit." Its priority expired before PNPC obtained the data and filed the information that is a statutory requirement for perfecting a license application with the Commission.

The majority gives two other reasons in support of its position. First, it states that while the Commission's regulations require a precise rather than a generalized description of proposed projects in preliminary permits, the purpose is not to define the scope of the permit but merely to meet the requirements of section 24 of the Federal Power Act for reservation of proposed power sites from public entry. Second, that PNPC was led by actions of the Commission to believe that it would have been pointless and unnecessary to seek an amendment to its preliminary permit following the denial of the Mountain Sheep-Pleasant Valley license application. The reasoning of the majority is not persuasive on either of these counts.

The relevant regulation governing the filing of preliminary permits provides as follows:

> § 4.82 *Contents of Application*
>
> Each application for preliminary permit shall • • • set forth in appropriate detail the following information in the order indicated:
>
> • • • • • • • • • •

(e) The location of the project, the region of its location designated by adjacent cities and towns, the name of the stream on which the proposed project will be located, and a statement of the extent to which commerce is carried thereon.

(f) The lands of the United States which will be affected by the proposed project.

(g) A general description of the project and the proposed scheme of development including an estimate of the proposed installed capacity, and the average annual output.

The information requested is essential in determining whether a permit should be granted and to provide preference agencies with adequate notice of the scope of the application. I can read into these provisions no requirement that would have prevented PNPC from asking for a permit which would have included HMS or Nez Perce instead of limiting its request to the MS and PV sites. Certainly no such mandate can be found in such terms as "a general description of the project" and "the region of its location designated by adjacent cities and towns."

In addition to the provisions quoted above, § 4.82(k) of the Regulations requires that there be filed with the application as Exhibit H a "general map showing the nature of the proposed project, its principal features and their location, and the location of the project as a whole with reference to some well-known town or stream." Again, I am unable to find an unyielding requirement for a permit limited to the precise project description or designation which PNPC sought and received. Obviously the Commission would be free to allow an applicant to file a general description in the first instance to afford notice of the

stretch of the river covered by the permit and later identify the project with greater specificity.[9]

The majority's assertion that the precise description of the project in this case relates only to the administration of § 24 of the Federal Power Act is far fetched indeed. It strains the imagination to accept the suggestion that the regulations were drafted exclusively to implement a routine function relating to land withdrawals, but serve no function in defining the scope of a priority which overcomes the rights of preference applicants that Congress took great pains to protect. Such an interpretation is in direct conflict with the overriding purpose of the Act to protect preference applicants and with the provisions of section 4(f) of the Act which require notice to States and municipalities and landowners in every county affected by a project before a permit is granted. That this reasoning will not hold up is borne out by the records of the Commission which show that no formal power site withdrawal was made in this proceeding, because the maps filed with the preliminary permit were not sufficiently accurate to serve as a basis for a formal withdrawal.[10] The specificity the majority insists is essential for power site withdrawals thus is lacking in this proceeding, and the asserted justification of the majority opinion vanishes.

The majority's other reason to support its position is that PNPC was led by actions of this Commission to proceed as it did in 1958 without seeking an amendment of its preliminary permit, relying primarily upon an order of

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[9] By the terms of the regulation a permit broader in scope could be accommodated since a proviso to § 4.82(k) states: "That any exhibit not incorporated as a part of the application shall be certified in conformity with § 131.4 of this chapter," (§ 131.4 being merely a certification form).

[10] Considering the known deficiencies of topographic mapping in many sections of the country, we may safely assume that this defect is unlikely to be an isolated case.

the Commission in the *Montana Power Co.* case.[11] This citation is not a Commission opinion but is a brief formal order innocent of any explanation germane to this case of why the Commission rejected the proposed amendment. The majority's heavy reliance upon *Montana Power* is a clear indication that there is no precedent for the decision in this case. There was no competing preference or private applicant then before the Commission in that proceeding, there was no priority issue, no need for a preliminary permit, and certainly no need for an amendment. Moreover the rejected permit application was for a project at precisely the same site the applicant was already exploring under an existing permit for a smaller dam.

If PNPC wished to base its course of action on Commission precedents it should have relied on our action in the *Appalachian* case,[12] a contested case decided after *Montana Power* on January 24, 1958, where an amendment to a preliminary permit was requested and granted, making changes comparable to those involved in the applicant's switch in the present proceeding from one project to another.

Judging by the Commission's customary standards, the public and competing license applicants were entitled to believe that PNPC's priority of application expired with our denial of the license application of Mountain Sheep-Pleasant Valley in 1958. At any rate the fate of PNPC's priority certainly was put in doubt following the denial of a license in 1958, and it was therefore PNPC's responsibility to ask the Commission for clarification. This much PNPC itself appears to have recognized, for on June 27, 1958, before undertaking further investigations, it filed a motion for a declaratory order to ascertain the status of the permit and priority. This motion reflected PNPC's awareness of the position taken by the National Hells Canyon Association and Northwest Public Power Associ-

[11] 17 FPC 834 (June 1957).

[12] 17 FPC 8, 19 FPC 169.

ation that the preliminary permit for the Mountain Sheep-Pleasant Valley project did not survive the denial of the license. On September 28, 1959, after having made further investigations at its own risk prior to a Commission ruling on its motion, PNPC sought and obtained leave to withdraw its motion. In deliberately postponing decision on the continuing validity of the permit and the extent of its priority rights, if any, PNPC took a calculated risk which did not improve its legal position.

While not reaching the issue of WPPSS's authority under state law to build the HMS or Nez Perce project, the majority indicates that there is a "serious question respecting the legal status of WPPSS." On this issue I need only say that in my opinion under section 9(b) of the Federal Power Act the authority of WPPSS is a matter for this Commission and not the courts to decide initially in the context of this license proceeding. I personally entertain no such doubts as my colleagues concerning the authority of WPPSS to build the project or its compliance with the requirements of section 9(b). *First Iowa Hydro-Electric Cooperative* vs. *Federal Power Commission,* 328 U.S. 152 (1946); *PUD No. 1 of Pend Oreille County* vs. *Federal Power Commission,* 308 F. 2nd 318 (CADC 1962), *cert. den.* 372 U.S. 908 (1963), *reh. den.* 372 U.S. 956 (1963). See also *City of Tacoma* vs. *Taxpayers of Tacoma,* 357 U.S. 320 (1958); *State of Washington Dept. of Game* vs. *Federal Power Commission,* 207 F. 2nd 391 (9th Cir. 1953) *cert. den.,* 347 U.S. 936 (1954).

This case represents the first direct legal contest concerning the construction of section 7(a) in relationship to sections 4(f) and 5. In this benchmark decision the majority of the Commission proposes to interpret sections 5 and 7(a) in a manner which gives the priority of a preliminary permit great and elastic reach while narrowly circumscribing the scope of the preference clause. They have done violence to the statute on both scores.

EXHIBIT A

FEDERAL POWER COMMISSION
WASHINGTON 25, D. C.

Project No. 2243—Oregon and Idaho

April 23, 1958

ROBERT D. YEOMANS, *Secretary,*
Pacific Northwest Power Company,
P.O. Drawer 1445, Spokane 10, Washington

DEAR MR. YEOMANS:

Reference is made to the application for license for the Middle Snake River project No. 2243 filed with the Commission on March 31, 1958. The Commission staff has made a preliminary examination of the application and the exhibits filed and finds that additional information and data are required for an understanding of the proposed project, including the proposed project boundary.

It is noted that Exhibits H and I are to be submitted at a later date. These exhibits should be supplemented by your power study and power market study for the proposed project. In this connection it is requested that you furnish a copy of your transmission study.

It is also noted that Exhibit L drawings filed with the application show area geology, a geologic section, and logs of drill holes taken from "Interim Report No. 4, Mountain Sheep Dam, Portland District Corps of Engineers" dated December 22, 1947. It is requested that you furnish a geology report for the Middle Snake River project. It is also requested that you advise the Commission of your plan for foundation exploration and when the exploration will be completed and submitted as a supplement to your application.

In connection with any dam which you propose to construct, it is requested that you furnish design criteria and

analysis and information as to your plans for additional analysis of the structure prior to construction.

With reference to the Exhibit N which you advise will be furnished later, it is requested that an estimate of cost with breakdown by major items for the Middle Snake River project be submitted as soon as possible. This should be supplemented by a detailed estimate of cost showing quantities and unit costs, together with other related construction costs. It is also requested that you submit your report on economic feasibility of the proposed Middle Snake River project.

It is requested that you advise as to the date when the data outlined above may be expected. Page 4 of the application states that applicant proposed to prepare and present appropriate information on alternative developments. Please advise as to when such information will be submitted.

A copy of this letter is being furnished to Smith, Gray, Hill & Rodgers, and Leighton & Sherline.

Very truly yours,

[S] J. H. GUTRIDE,
Secretary.

EXHIBIT B

PACIFIC NORTHWEST POWER COMPANY
P.O. Drawer 1445
SPOKANE 10, WASHINGTON

March 11, 1958

MR. JOSEPH H. GUTRIDE, *Secretary,*
Federal Power Commission,
Washington 25, D. C.

DEAR SIR:

Applicant has received a copy of letter from the attorney for the intervenors, dated March 4, 1958 and addressed to Commissioner William R. Connole. Attorney for intervenors misapprehends the relief requested. This letter is in reply thereto.

In assignment of error number 7, applicant refers to the Nez Perce and High Mountain Sheep projects, the latter of which is located below the mouth of the Imnaha and above the mouth of the Salmon. Preliminary investigation indicates that High Mountain Sheep with subsequent development of Lower Canyon would have approximately 500,000 acre feet more storage and about 150,000 kilowatts more installed capacity than Nez Perce. Under paragraph 3 of its prayer, applicant proposes to study the High Mountain Sheep project on a comparative basis with Nez Perce. Such a study is necessary before a final determination can be made as to the project which will constitute comprehensive development under the provisions of Section 10(a) of the Federal Power Act.

Approximately ten months will be required to complete such study, depending upon the extent of drilling and engineering that may be necessary.

Specifically, in undertaking such comparative analysis, applicant will:

(a) Make geological investigations and studies;

(b) Do such engineering work, including preparation of maps, plans and specifications, as may be necessary, to determine problems of construction, quantities of earth and rock to be moved, materials and supplies required, type of structure to be built, and such other determinations as may be relevant to make comparable estimates of cost;

(c) Determine the amount of storage usable for flood control and power production;

(d) Carry out power routing studies and power capabilities;

(e) Determine flood control routing and effectiveness of flood control;

(f) Investigate the extent and cost of facilities required for the consideration of fishery resources and recreation opportunities.

Applicant will report the results of such study to the Commission and to all parties.

Applicant intends to prepare and file an amended application for a license for such project as appears as a result of such study to be economical and practical and meets the requirements of Section 10(a) of the Federal Power Act.

Applicant does not expect a license to be granted without a further hearing.

We are making the same distribution of this letter to the Commission as was made by counsel for intervenors, and are mailing copies to the parties as noted below.

Yours very truly,

PACIFIC NORTHWEST POWER COMPANY,
[s] John J. Burke,
By JOHN J. BURKE, *President.*

cc: EVELYN N. COOPER,
Hilmer & Cooper,
1025 Connecticut Avenue, NW.
Washington 6, D.C.
T. J. JONES III, ESQ.
Assistant Attorney General
State Capitol
Boise, Idaho
ROBERT Y. THORNTON, ESQ.
Attorney General
Salem, Oregon
JOHN C. MASON, ESQ.
Federal Power Commission
Washington, D.C.

BLACK, Commissioner, *dissenting;*

I concur with Chairman Swidler's dissent, but I did not participate in the Commission's decision on the selection of the site and, therefore, express no opinion as to the relative superiority of the Nez Perce or proposed High Mountain Sheep developments.

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APPENDIX C

FEDERAL POWER COMMISSION

Opinion No. 418-A †

PACIFIC NORTHWEST POWER COMPANY, PROJECT NO. 2243 AND WASHINGTON PUBLIC POWER SUPPLY SYSTEM, PROJECT NO. 2273

Opinion and Order on Rehearing and Denying Motions for Stay and to Strike

(Issued April 30, 1964)

* * * * *

[Syllabus omitted.]

* * * * *

Chairman Swidler and Commissioner Black *dissenting.*

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Harold C. Woodward, and David S. Black.

Ross, *Commissioner:*

Applications for rehearing and stay were filed on March 6, 1964 by the Department of the Interior, the Department of Conservation of the State of Washington, and the Washington Public Power Supply System (WPPSS) with respect to our Opinion and Order No. 418 issued February 5, 1964, 31 FPC 247. Pacific Northwest Power Company (PNPC) filed a motion to strike the applications of Interior and WPPSS on March 16, 1964. Thereafter on March 26, 1964, Interior filed a motion to strike or, in the alternative, to reopen the record. Responsive pleadings to the above applications and motions have also been filed.[1]

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† 31 FPC 1051 (1964). This opinion is also printed at II Joint Appendix, p. 780, Washington Public Power Supply System v. FPC, 358 F. 2d 840 (D.C. Cir. 1966).

[1] On April 4, 1964, the Chief of the Forest Service, Dept. of Agriculture, filed a letter in which he requested amendment of Article 53. While the propriety of this filing is open to question, we have duly considered it but believe the amendment he suggests is not appropriate.

In our Opinion and Order we determined that the proposed hydroelectric project at the High Mountain Sheep Site is best adapted to a comprehensive plan for developing that reach of the Snake River above the mouth of the Salmon River, as opposed to the Nez Perce site below the mouth of the Salmon River. We also granted a license to the Pacific Northwest Power Company (PNPC) rather than to WPPSS, and refused to recommend federal development. We are of the opinion that the points raised have been largely covered by our original opinion, but will add the following comments to clarify our position.

Interior initially reargues that "there is no present regional need for the power to be generated by the High Mountain Sheep project which would balance the probable damage to the fish resource." In our original opinion we took cognizance of developments affecting the power generating capability of the Pacific Northwest which occurred since the close of the record. Specifically, we considered the power to be generated by Hanford, Wells and from Canadian Storage. On the basis of the record, including the recent developments, we found a regional need for the power HMS would generate by 1970-1971, and that PNPC particularly would need additional power by 1967-1968. While Interior disagrees with our conclusion, it alludes to no facts to support its position. We have nevertheless reexamined this issue and find that HMS power will be needed on a regional basis by 1970-1971 as we originally concluded, to which PNPC and WPPSS both agree.

Interior also argues that the Commission erred in not recommending federal development under Section 7(b) of the Federal Power Act. Section 7(b) provides that, "Whenever, in the judgment of the Commission, the development of any water resources for the public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development." The Department interprets this section to mean that once there are Federal projects on a river, all projects possibly affecting them must be undertaken by the United States. The Department states

that on the Columbia River system, the choice has been made for us by the Congress.[2] For the reasons stated in our original opinion, we disagree with this interpretation.

In addition, Interior argues that federal development is necessary to achieve that coordination necessary to obtain maximum use of HMS for flood control, navigation and power purposes. We disagree.

With respect to flood control, Article 51 requires PNPC to operate HMS in a manner consistent with optimum flood control purposes at no cost to the government for the loss of any power resulting from such operation.[3] The

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[2] The Department states on p. 8: "Thus, as to the water resource through Asotin, the 'judgment' of the Commission has been replaced by the judgment of Congress."

[3] *Article No. 51.* In the interests of flood control downstream from the project, the Licensee shall operate the project in accordance with an agreement to be entered into by the Licensee and the United States Corps of Engineers for the purpose of determining detailed operating procedures for use during flood periods, in accordance with the following principles:

a. The total live storage space of about 2,250,000 acre-feet between elevation 1337 and elevation 1510 mean sea level will be made available for flood control use if and as required.

b. The reservoir level will be no higher than elevation 1475 by 1 March each year to provide about 600,000 acre-feet of storage space for flood control use at that time each year. Additional storage space will be made available between 1 March and the beginning of the flood period to insure the availability on 1 May of the total capacity needed for flood control as estimated by the Corps of Engineers.

c. The space made available as set forth above will be retained until capture of flood flows is requested by the Corps of Engineers, subject to involuntary storage as may be required due to excess of inflows over outlet capacity, or until refilling is authorized by the Corps of Engineers. In the event of involuntary storage during flood control operations, full storage capability will be regained as soon as possible.

d. During the flood storage period controlled outflows will be as warranted by the flood control requirements as determined by the Corps of Engineers with due regard to the requirements for the optimum multiple purpose operations of the project. When the Columbia River discharge at The Dalles is 600,000 cfs or higher the daily outflow may be re-

specific terms of the operation of HMS for flood control purposes are made subject to agreement between Corps of Engineers and the licensee in accordance with principles contained in the Article. This article is consistent with PNPC's unqualified commitment to operate HMS in such manner.[4] Upon our own motion, we are eliminating the last sentence of Article 51 since it is ambiguous and adds nothing of substance to the Article.

In addition, Article 52 requires PNPC to maintain a minimum flow of not less than 13,000 cfs when determined to be required—not by PNPC—but by the Corps of Engineers.[5] PNPC is not entitled to reimbursement for oper-

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duced to a minimum of 10,000 acre-feet; except that during years of severe flood conditions the daily outflow may be reduced to a minimum of 4,000 acre-feet; below 600,000 cfs discharge at The Dalles, the outflow will be determined with due consideration given to all purposes of the project.

e. A discharge capacity of 65,000 cfs at minimum pool elevation 1382 is to be provided by the Licensee. This discharge capacity is based on the gated outlet capacity plus one half of the ultimate turbine hydraulic capacity.

The agreement will be subject to review from time to time as requested by the Licensee or the Corps of Engineers.

[4] We have said to you positively we will produce flood control storage from this project as requested by the Corps of Engineers, without compensation, at any time, with or without Canadian storage at any time, without reservation, we will do it. (Tr. 14,770-1)

[5] *Article 52.* In the interest of navigation the project shall be operated in accordance with the following requirements:

a. Minimum flow of not less than 13,000 cfs will be maintained at Lime Point, Idaho, during annual storage refill season when determined to be required by the Corps of Engineers in the interest of navigation. Flows of up to 16,500 cfs may be required at other times when determined by the Corps of Engineers to be necessary in the interest of navigation.

b. River fluctuations in the reach between Lewiston and Lime Point resulting from project operation shall not exceed a rate of one and a half feet per hour on the rising stage, and one foot per hour on the falling stage unless otherwise approved by the Corps of Engineers.

ating in this manner despite the fact that power benefits may accrue to the downstream federal plant. The minimum flow specified conforms precisely to that recommended by the Corps of Engineers. (FPC Ex. 37)

Article 14 constitutes the provision requiring the licensee to coordinate electrically and hydraulically for power purposes.[6] This Article presupposes, as does the coordination of any endeavor, the willingness to plan cooperatively in order to serve the region in the most effective and enlightened manner. Certainly, the object of providing the optimum firm load carrying ability and of producing the maximum amount of usable secondary energy for the region could be frustrated by any participant, be he federal, public or private. However, it is beyond reasonable belief that any responsible agency, whether federal, public or private, would in the face of enlightened public opinion deliberately seek to sabotage the object of Article 14 which was designed to secure for the Northwest benefits heretofore recognized but, until recently, seldom obtainable for a mixed river basin system.

Interior for the first time in its application for rehearing, questions the adequacy of Article 14 which, until now, enjoyed the support of all the parties in the case. Interior's objective and purpose, namely, "to optimize regional power production consistent with other water resource development and purpose", is the some as ours. We, like Interior, recognize that "coordination may permit storage of water in one party's reservoir for the benefit of another. It may permit an exchange of winter energy from one system for

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[6] *Article 14.* The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

summer energy of another thereby increasing the firm capabilities of both systems. It may reduce the requirement of reserve capacity to the benefit of both systems. It may permit the joint use of transmission facilities or the exchange of energy between systems so as to reduce transmission requirements.'"[7] In addition, coordination may include the planning of new generating resources and scheduled maintenance and the sharing of resources.

We believe that, in keeping with the spirit referred to above plus the legal effect of Article 14, we will achieve the notable results sought by us all. However, we do not believe that the Article proposed by Interior, insofar as it refuses to recognize an equitable sharing of benefits in the context of a mixed system of plants in a common basin, will result in the maximum economic benefit to the region.[8] Only by recognizing the contributions of each system in providing for an equitable sharing of benefits will the optimum development of our resources envisioned by the framers of the Water Power Act become a reality. This represents nothing novel to this region. As a matter of fact, this approach is entirely consistent with the principles underlying the Pacific Northwest Coordinating Agreement, an agreement to which Interior (BPA), PUD's and private power companies are parties.

We do agree with Interior that the licensee should be obliged to provide transmission facilities necessary to effectuate the desired coordination. It had been our understanding that this requirement was implicit in Article 14. In view of Interior's concern, it is apparent that this un-

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[7] Comments of Interior, March 13, 1964, pp. 22-23, Project No. 1971.

[8] This is not to say, as Interior alleges, that Article 14 requires the federal government to pay for headwater benefits—a payment precluded by Section 10(f) of the Act. As we have earlier stated, Article 14 does not require 10(f) payments. *P.U.D. No. 1 of Douglas County, Project No. 2149*, 28 FPC 128.

derstanding is not shared by all interested parties. We will therefore amend the Article to expressly include this requirement in order to obviate any debate in the future. We are also modifying the Article to clarify our original idea that this Article is designed to maximize power production and other beneficial public uses.

Beyond the changes noted above, we are satisfied that Article 14 requires no further modification. We have described the general principles applicable thereto and do not consider it feasible to reduce them into concrete terms at this time. By the time HMS will be ready for operation, the factual situation and the consequent requirements may be substantially different from those prevailing at this time.

WPPSS's principal objection relates to our interpretation of the priority afforded by a permit. WPPSS misunderstands the significance of the preference and priority provisions of the Act. The priority provisions were not designed to counter-balance the preference rights of public bodies. To the contrary, the priority sections have independent significance and are not directed to the public-private power controversy. The purpose of the priority provisions is to encourage development of the nation's waterways by giving reasonable protection to a party investigating the development of a given reach of the river. Obviously, there would be little incentive to conduct costly and time-consuming studies of a particular reach if another party could, after the studies were completed, file a competitive application and have at least equal rights with the party making the investigation. The priority provisions were drawn to afford protection to one who makes such investigations, irrespective of whether the party involved is a private or public agency.

During the present age which is witnessing a move toward large scale generation and integration, it is evident that the priority provisions of the Act will assume greater

significance for municipal bodies as between themselves. No longer are such agencies restricted to a relatively small area. WPPSS, a Washington municipality, for example, is here applying for a project on the Idaho-Oregon boundary. Future cases will undoubtedly witness competitive license applications by local and distant municipal bodies. Needless to say, the question of priority could be decisive in such cases.

WPPSS argues that our decision disregards and completely reverses policies, interpretations and practices of the Commission, established and consistently followed for over forty years. Specifically, WPPSS charges that our finding that PNPC has priority under its preliminary permit is contrary to a General Counsel's opinion issued in 1923 (and not heard from again for all practical purposes until this case). As we stated initially; the General Counsel was issuing an opinion in response to the question whether priority could survive a three-year period if a license application were filed before the term of the permit expired. Our decision herein is consistent with this opinion.

The General Counsel's opinion does contain extraneous language. However, for us to rely, as a binding precedent, upon a gratuitous dictum remark of a General Counsel made years ago—untested by the sharp exchanges of learned opposing counsel whose clients have much at stake as in this case, is carrying the doctrine of reliance upon dicta to an extreme which twists a legal principle beyond recognition. Moreover, WPPSS has admitted that we are dealing with "a purely legal issue not heretofore decided by either the Commission or the Courts."[9]

On page 29 of its application WPPSS states its position with respect to the protection afforded by a permit. Be-

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[9] WPPSS application for stay, p. 3. The minority also agree that this is a case of first impression. Dissent, p. 19.

cause this position is identical to that we have adopted we cite it in full:

> "Reasonable security" under a permit is not insubstantial. It consists of:
>
> (a) Protection pending investigation against the acceptance for filing of license *applications* by others *affecting the same reach* (FPC Reg. § 4.30); [Application for Rehearing, p. 29; emphasis added.]

The regulation cited by WPPSS reads as follows:

> § 4.30. An application for license may be filed by any citizen, association of citizens, corporation, State, or municipality desirous of obtaining a license pursuant to the act: *Provided, however,* That if a preliminary permit has been issued, no action on applications by others than the permittee *covering in whole or in part the same reach* of stream or streams shall be taken that might infringe on the rights of the permittee under sections 5 and 7 of the Federal Power Act. [Emphasis added.]

Both WPPSS and our regulations thus confirm our view that the scope of a permit extends beyond the incredibly narrow confines of mileage location, exact to the tenth of a mile, and project description including the height of the dam to the foot, as described therein. We are satisfied that permits provide a priority to the reach of the river encompassed by the project described in the permit.[10]

WPPSS argues that the result of our interpretation of priority may be to trigger a race for preliminary per-

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[10] Throughout its application WPPSS attempts to inject an element of confusion as to exactly what reach is covered by PNPC's permit. The stipulation entered at the prehearing conference in this case resolves any alleged confusion on that score. See original decision, note 10, *supra*, p. 254. [The page reference is to the official opinion. This reference can be found at p. 29a, *supra*.]

mits for the purpose of tying up all major undeveloped water resources of the country. This is reminiscent of the fears expressed during the hearings and debate on the Water Power Act by some members of Congress to the effect the private power companies would immediately file for all the good sites. The flood did not occur. The same is true regarding WPPSS's concern. Whatever the basis for WPPSS's insight, it seems unjustified. There has not been a single application for a preliminary permit filed since the time our original decision was released.

WPPSS also argues that a permittee must apply for an amendment if it desires to construct a project different from that described in the permit. Whether amended permits would be granted would depend, in WPPSS's view, upon undescribed "facts" and whether a preference agency filed a competitive application. Under this view, a permittee would have no flexibility to develop the best project on the reach involved. In effect, the permittee would have on assurance of protection exclusively for the project described in the permit, which is really no protection at all. As we stated in our decision, there has never been a project constructed exactly as initially described in a permit to our knowledge.

In this connection, it is interesting to note that the minority also rejects this view. Actually, the minority essentially agrees with our position on priority, with the sole exception noted below. This should not be surprising because the minority recognizes the obvious need "that an applicant be allowed flexibility and be encouraged to study all reasonable alternatives, including those not known at the time of an application for a permit." The minority suggests that "the way to obtain this flexibility, however, is by allowance of needed amendments."

The meaning of the minority approach can best be understood by the following examples. Municipality A after

conducting studies under a two-year permit[11] covering a certain reach of the river X—Y discovers that a site one-tenth of a mile downstream would permit increased power generation at lesser costs and at the same time more fully develop the recreational, flood control, navigation and other uses of the river. Municipality A therefore files for an amendment to its permit describing the site. However, before the Commission acts on the application for amendment, Municipality B files for a permit describing the same project. If, for any reason, the minority would deny Municipality A's application for amendment to its permit, then the flexibility the minority concedes is required by permittees is not achieved.

Rather than assuming this position, it seems safe to conclude that the minority, having urged the filing of amendments, would grant them. Thus, the minority would grant A's application for amendment to its permit and deny B's application for permit. As Commissioner Black states: "An applicant would obviously be entitled to routine approval of an amendment to his permit. . . ."

The full significance of this approach becomes apparent when A is not a municipality but a non-preference body such as a co-op. Again, we assume that Co-op A was granted a two-year permit, describing project 1 which would develop given reach of the river X—Y. Immediately after the grant, A conducts studies of X—Y and confers with the several interested federal and state agencies concerned with water development, as required by the specific terms of the permit. As a result, it becomes apparent one year later that site 2,500 feet downstream, in addition to other engineering changes would best develop reach of the river X—Y. So, according to the Minority, Co-op A would file for an amendment. Before the Commission acts on A's application for amendment, Municipality B files an appli-

[11] The usual term of permits currently granted by the Commission is two years.

cation for a permit, describing the same project as that identified by A in A's application for amendment. Thus, the Commission has two mutually exclusive applications before it.

Section 7(a) of the Power Act requires the Commission to give preference to municipalities in granting applications for permits. And here is the rub. Which application would the minority grant: A or B's? If, for *any* reason, the minority would not grant A's application, it would not give permittees the flexibility and encouragement it states is required. However, the only way the minority could grant A's application without violating the flat command of Section 7(a) is to hold that A's priority and consequently its flexibility derives from its original permit. But if A's flexibility derives from its initial permit, why all the fuss about filing for amendments?

Thus, the only difference between our position and that of the minority is that the latter would insist on paper filings of extremely dubious significance.

WPPSS also argues that our decision would deprive it of statutory notice so it would be unable to exercise its preference rights.[12] Since at least 1954, WPPSS and its predecessor in interest, the Northwest Public Power Association have actively participated in all of the proceedings involving this reach for the purpose of advocating the advantages of Nez Perce over alternative sites on the Snake. At the public hearings held in Lewiston, Idaho on the preliminary report in S.D. 51,[13] then proposing what is now High Mountain Sheep, Mr. Gus Norwood, Executive Secretary of the Northwest Public Power As-

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[12] See also dissent, *Supra*, pp. 298-299. [The page reference is to the official opinion. The reference can be found at pp. 108a-109a, *supra*.]

[13] Senate Document 51, June 14, 1955, comprises a report of the Corps of Engineers on its studies of the Middle Snake River, in which it recommends construction of a dam at the Mountain Sheep site in contrast with the Nez Perce site.

sociation, filed a protest because High Mountain Sheep would pre-empt Nez Perce. He did the same thing when PNPC filed its application for preliminary permit, and intervened for the purpose of again urging Nez Perce during the previous hearing on the Mountain Sheep-Pleasant Valley license proceedings. As pointed out by the Examiner herein, the managing director of WPPSS testified:

> I am sure had [PNPC] * * * seen fit to make a filing on the Nez Perce project, in my opinion the public agencies wouldn't have made a filing on the Nez Perce project. (Tr. 4448)

WPPSS was never really misled or deprived of notice. To the contrary, WPPSS knew exactly what was going on but apparently had to change horses in midstream. Its early interest was directed to promoting the Nez Perce site, assuming all the while that Interior would undoubtedly want to construct the project or, at the very least, could be induced into it. When WPPSS realized that it would not be bailed out by Interior and that the grains of sand were running short, then it became necessary for WPPSS to change its strategy. It therefore entered a claim for Nez Perce. Only after that hearing concluded did WPPSS come to realize that the preservation of the fish runs on the Salmon River would unquestionably be the determining factor in the case and preclude construction of Nez Perce. Only at that late stage did WPPSS take its pride in hand and assert a claimed preference for the HMS site, distasteful as it must have been—and still is—to its concept of what is the proper development of this reach of the river. We have no sympathy for WPPSS's alleged deprival of notice.

In addition, WPPSS criticizes our reliance upon the legislative history of the Water Power Act with respect to land withdrawals as explaining why FPC permits describe specific projects. WPPSS erroneously states that Congress

was unconcerned with the extent of land withdrawals in its consideration of the Water Power Act.

The legislative history is to the contrary. Mr. Raker stated:

> The committee and those who appeared before the committee had this in view, that while we want to conserve the public domain and the public property for uses that might be made for the purpose of developing hydroelectric power in all its forms for ditches, houses, plants or reservoirs, it should be done, but at the same time we are beginning to realize that a reservation simply to mark imaginary lines around a large tract of land and saying that is conservation, but not using it, means nothing. It is absurd; it is ridiculous.[14]

Mr. Mondell criticized land withdrawals:

> We have a lot of lands withdrawn for water-power purposes. In the nature of things they could not have been withdrawn very intelligently, because they were withdrawn hurriedly. The best lands for the development of water power were not always withdrawn. That was not with intent; that was out of ignorance. Other lands were withdrawn simply because they lay along streams, and without much regard to the possibility of power development. The withdrawals were wise and otherwise—and largely otherwise.[15]

Still later, we read:

> I can see a man filing an application in my district covering a million acres under this law whereby every improvement on that land in the way of future home-

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[14] Cong. Rec.—House, August 20, 1914, Vol. 51, p. 14062.

[15] 65th Cong., 2nd Sess., Hearings, House Committee on Water Power, May 18, 1918, p. 624.

steading, future desert-land entries, future mining entries, would be absolutely blocked until the land was released by the commission or by Congress. I can see myself working here for the next 40 years in getting homestead and desert-land claims and mining claims released from this kind of application for the good, honest citizens of this country who want to go there and live and develop it as they ought to.

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(Mr. Johnson) The gentleman from California [Mr. Raker] is quite right. We have tied up too much.[16]

Congress was concerned with undue land withdrawals and clearly expressed its concern. In the light of this history, it is not surprising that the Commission historically has followed a policy of requiring the filing of applications for permits to describe a project with particularity. Since, under § 24 of the Act, a reservation is automatically effected by filing for a permit, the Commission's continuous practice in this regard represents a satisfactory compromise between the necessity to preserve valuable power sites and the need to make valuable land areas available for public entry.

WPPSS also quarrels with our findings as to the power requirements of WPPSS and PNPC. WPPSS does not contest our finding that PNPC will have a need for the power by the time HMS is constructed. To the contrary, WPPSS recognizes PNPC's deficiency and suggests that PNPC must find some manner of offsetting this deficiency during the period HMS is being constructed. We agree. However, we are confident that PNPC will find some satisfactory method of serving its customers in the interim period. In view of this situation and because our selection of PNPC is based on its priority, it is unnecessary to treat this matter further. It is sufficient for us to note

[16] Cong. Rec.—House, Sept. 5, 1918, Vol. 56, p. 10035.

that WPPSS has failed to show we made any material error in this area.[17]

WPPSS complains that we have ignored the difference between its proposal for HMS and that of PNPC. This is incorrect. However the differences between the two proposals are of such a technical engineering nature that they must await the submission of final plans. It is impossible at this point to determine the precise nature of the project which will eventually be constructed at HMS. We recognized this situation in our decision. On page 252, we stated that a complete geological study carried out by a more elaborate program of borings is required before construction can be authorized at any HMS site. On page 255 we noted that final plans may differ from what we characterized as the estimates submitted herein. We therefore specifically refused to find that the data submitted respecting these plans precisely represent the ultimate development of either plan. In order to assure that the complete potential of this reach of the river is fully developed by PNPC, *i.e.*, that development required by Section 10(a) of the Act, we specifically included Articles 39 through 44 in the license.

However, to avoid any possible ambiguity, we are modifying our order to describe the project works at the HMS site; which, on the basis of present information, we find to be best adapted to a comprehensive plan of development under the test set forth in Section 10(a) of the Act.

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[17] WPPSS currently notes that, on the basis of average energy resources during the winter control storage period, as shown by the record, with the addition of the Wells and Hanford projects, PNPC might not require all of the HMS energy until 1969-1970. WPPSS also points out correctly, contrary to our statement that it does not own or operate any electric facilities, that since the close of the record it has constructed the Packwood Project (No. 2244) with 26,000 KW of normal capacity and has under construction steam generating facilities associated with the Hanford nuclear project.

All three applicants for rehearing have requested a stay of our opinion and order granting a license to PNPC pending appeal. Under Section 313(a) of the Federal Power Act a stay does not result automatically from the filing of application for rehearing. In *Virginia Petroleum Jobbers v. F.P.C.*, 259 F. 2d 921 (CADC 1958) the court prescribed four tests which must be satisfied in order to justify a stay of an administrative order: (1) Petitioner must be likely to prevail on the merits; (2) Petitioner will be irreparably injured;[18] (3) Issuance of the stay will not substantially harm other interested parties; and (4) The public interest would not be adversely affected.[19]

Treating these tests in reverse order, we have unanimously found that HMS power certainly will be required by the time construction is completed. Thus, any postponement would be injurious to the public interest. PNPC, particularly, has an urgent need for the power and our refusal to allow it to proceed with its plan to construct this economical project would clearly be to its economic disadvantage. On the other hand, WPPSS has singularly failed to allege *any* injury to it resulting from a refusal to stay, much less irreparable injury. Finally, for the reasons stated herein and in our original opinion, we believe that our decision will be affirmed if appealed.

In addition, it is significant that PNPC will not begin actual construction of HMS until completion of additional

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[18] As to this element, the court stated: "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against claim of irreparable harm." 259 F. 2d 925.

[19] "In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial." *Ibid.*

studies required by our order. Article 42, as amended, provides:

> The Licensee shall submit, in accordance with the Commission's rules and regulations, revised Exhibit L drawings and Exhibit M for the project structures and Licensee shall not begin construction of the project works until the Commission approves the exhibit.

These activities will not be completed before our order becomes subject to the jurisdiction of the court, and thus would not preclude the use of the site by another party. There is no reason to fear that a federal court would distort its judgment because of these investigative activities, particularly since PNPC would be proceeding at its own risk.

PNPC on March 16, 1964, filed a motion to strike the application for rehearing filed by WPPSS on the ground that it was not filed under oath in accordance with Section 1.34(a) of the Commission's rules, and filed a similar motion to strike the application of the Department of the Interior for this reason and for the further reason that under the Commission's order of December 14, 1962 the Secretary is a limited participant and was not authorized to file a petition for rehearing. Verifications for the two applications were filed on March 16, 1964, and, while this was not in strict conformity to our rules, our Secretary by accepting the applications for rehearing properly waived the failure to make the filings under oath in accordance with his authority delegated by Section 3.5(9) of the Rules. In this connection, our order of December 14, 1962 was intended to permit the Department of the Interior to participate in the remaining procedural steps in this case. Accordingly, that order does not limit Interior in contesting the order adopted.

The Commission further finds:

The applications and motions hereinabove described present no new facts or principles of law which warrant any change in the order of February 5, 1964, except to the extent noted in ordering paragraph (A) below.

The Commission orders:

(A) The Commission's order entered in this matter on February 5, 1964 is modified in the following respects:

(i) Paragraph (A)(ii) is amended to read as follows:

All project works consisting of a concrete arch dam approximately 670 feet high, creating a reservoir extending about 58 miles upstream to Hells Canyon tailwater (Project No. 1971) on the Snake River and about 10 miles upstream on the Imnaha River with normal water surface area of about 17,300 acres and gross storage capacity of 3,600,000 acre-feet at normal water surface elevation 1510, of which 2,250,000 acre-feet would be usable with a draw down of 173 feet; a chute-type radial-gate controlled spillway located at the right abutment; low level intakes; an outdoor type powerhouse, immediately downstream of the dam, having an initial installation of six units with each turbine rate 321,000 horsepower at 550-foot head and each generator rated 200,000 kw (210,000 kva at 0.95 power factor); with provisions in the plans for the addition of four additional units, and appurtenant electrical and mechanical facilities; the location, nature, and character of which are subject to the Commission's approval under Article 42.

(ii) Article 14 is amended to read as follows:

The licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other power systems and in such manner including the construction of additional transmission facilities as the Commission may direct in the in-

terest of maximizing power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the licensee as the Commission may order.

(iii) Article 42 is amended to include "and Exhibit M" after the word drawings in the second line.

(iv) Article 51 is amended to eliminate the last sentence.

(v) Article 56 a. is amended by changing "1,166,700" to "1,600,000" in the fourth line.

(B) The applications for rehearing and for stay filed by WPPSS, the Secretary of the Interior, and the Department of Conservation of the State of Washington are hereby denied.

(C) The motions of PNPC to strike the applications for rehearing filed by the Secretary of the Interior and WPPSS are hereby denied, expect to the extent heretofore described.

(D) In acknowledgment of the acceptance of this license, it shall be signed for the licensee and returned to the Commission within 60 days from the date of the issuance of this order.

Chairman Swidler and Commissioner Black *dissenting.*

Commissioner Black *filed* a dissenting statement appended hereto.

BLACK, Commissioner, *dissenting:*

I dissent to the majority's order on rehearing for the reasons already stated in the dissenting opinion to the licensing decision of February 5, 1964.

The Commission's rather labored defense of its position presents nothing new and does not require any extended restatement of the views expressed by the Chairman in which I have concurred. The majority neglects for the

most part even to discuss the competing applications with which we are concerned and the principles of law which apply to the facts before us. Instead, we are treated to a little fantasy in which hypothetical parties are engaged in a controversy unrelated to the case at issue. This Commission can strain with its A's and B's, its X's and Y's, its fictitious municipalities and co-ops, and move its fanciful projects 500 feet up and down stream until the Salmon and Snake Rivers both begin flowing uphill; for the fact situation posited by the majority completely misses the point. Here PNPC did not seek to change its Low Mountain Sheep-Pleasant Valley project as a result of site explorations. It applied for HMS, because the Commission rejected its license application for the LMS-PV project. An applicant would obviously be entitled to routine approval of an amendment to his permit, in appropriate cases, where his exploration at the project site indicated that changes in the project were desirable.

Try as they will by discussing cases which are not before us, my colleagues of the majority cannot change the facts that (a) the Commission had precisely defined the scope of PNPC's preliminary permit; (b) PNPC's license application within the scope of that permit was denied by the Commission; (c) only after the expiration of the preliminary permit originally issued in this docket did PNPC conduct the necessary investigations to support this new site; and (d) WPPSS is a preference entity under Section 7(a) of the Federal Power Act which provides that "the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region."

These factors are dispositive of the case; but lest silence on the remaining aspects of this controversy might imply

that the minority no longer adheres in toto to its position, it should be restated that (a) the effect of the preliminary permit issued PNPC terminated upon the Commission's denial of its original license application and (b) PNPC failed in any event to perfect its application for the High Mountain Sheep project within the three-year statutory limit. No useful purpose would be served by repeating here the arguments which support these positions already set forth at length in the Chairman's dissent to the February 5 order and opinion.

I also dissent to the Commission's refusal to grant a stay of the order pending appeal. As the Supreme Court has stated, the granting of stay "is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case."[1] The case cited by the majority, involving an issue of the right of competing fuel interests to intervene in certificate cases arising under the Natural Gas Act, is not in point. Further, it relates to the standards applicable to judicial stay of administrative actions which are not the same as the standards which administrative bodies must apply to their own decisions. At any rate, we should note the Court's observation that "injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits."[2] Surely we can take into account the fact that difficult and closely controverted questions of law of the most far reaching significance are presented by and go to the very heart of this case.

To grant a stay does not constitute an admission of error—it only bespeaks a certain degree of caution and

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[1] *Scripps Howard Radio* v. *F.C.C.*, 316 U.S. 4, 10, 11; 86 Lawyers edition 1229, 1234.

[2] *Virginia Petroleum Jobbers Association* v. *F.P.C., Op. Cit.*, page 925.

prudence which it might behoove this Commission to exercise. The majority implicitly acknowledges that the review process may not be completed before construction would normally commence and that a stay would delay construction. However, if the wrong party moves in and begins development of the site or otherwise incurs costs associated with such development our problems are greatly complicated in the event of a remand by the court. More importantly, by failing to stay the effect of the order, we are permitting and encouraging the expenditure of perhaps large sums of money which will be reflected in the cost of service—of those utility companies comprising PNPC. This result is hardly protective of the public interest. I feel strongly that we should do everything in our power to preserve the status quo until the strenuously contested legal issues in this case are properly disposed of by the courts. The damage to the parties and to the public interest which will result from premature construction activities, should this case be remanded to the Commission, in my opinion greatly outweighs the detrimental effect of delay pending judicial review.

Chairman Swidler joins in these views.

APPENDIX D

(Filed December 21, 1954)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Project No. 2173

In the Matter of

PACIFIC NORTHWEST POWER COMPANY

December 16, 1954

Notice of Application for Preliminary Permit †

Public notice is hereby given that application has been filed under the Federal Power Act (16 U.S.C. 791a-825r) by Pacific Northwest Power Company, of Portland, Oregon, for preliminary permit for proposed Project No. 2173, consisting of two proposed water-power developments designated as Mountain Sheep and Pleasant Valley, to be located on Snake River in Idaho County, Idaho, and Wallowa County, Oregon, affecting lands of the United States within Wallowa, Weiser and Nez Perce National Forests, and described respectively as: Mountain Sheep, comprising a concrete arch dam with top elevation of about 1108 feet (m.s.l.) located at river mile 192.6 in SE¼ Sec. 30, T. 29 N., R. 3 W., B. M., Idaho, and SE¼ Sec. 18, T. 4 N., R. 49 E., W. M., Oregon, creating a reservoir extending about 20.6 miles to the Pleasant Valley site; a powerhouse with provisions for installation of 250,000 kilowatts of generating capacity; and appurtenant facilities; and Pleasant Valley, comprising a concrete arch dam with top elevation of about 1475 feet (m.s.l.) located at river mile 213.2 in NW¼ Sec. 29, T. 27 N., R. 1 W., B. M., Idaho and SW¼ Sec. 17, T. 2 N., R. 51 E., W. M., Oregon, creating a reservoir extending about 34 miles to Hells Canyon dam

† This notice is also printed at II Joint Appendix, p. 810; Washington Public Power Supply System v. FPC, 358 F. 2d 840 (D.C. Cir. 1966).

site containing about 850,000 acre-feet of storage capacity of which about 300,000 acre-feet will be usable for power, flood control, and other beneficial uses; a powerhouse with provisions for installation of 600,000 kilowatts of generating capacity; and appurtenant facilities.

Protests or petitions to intervene may be filed with the Federal Power Commission, Washington 25, D. C., in accordance with the Rules of Practice and Procedure of the Commission (18 C.F.R. 1.8 or 1.10), the time within which such petitions must be filed being specified in the rules. The last day upon which protests may be filed is February 3, 1955. The application is on file with the Commission for public inspection.

LEON M. FUQUAY
Leon M. Fuquay,
Secretary.

APPENDIX E.

FEDERAL POWER COMMISSION

Order issuing preliminary permit †

Pacific Northwest Power Co.

Project No. 2173

April 8, 1955

Application was filed November 9, 1954 by Pacific Northwest Power Company, of Portland, Oregon, for a preliminary permit under the Federal Power Act (hereinafter referred to as the Act) for proposed Project No. 2173, to be located on Snake River, navigable waters of the United States, in Idaho County, Idaho, and Wallowa County, Oregon, and affecting lands of the United States within Wallowa, Weiser and Nez Perce National Forests.

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† 14 FPC 644 (1955). This order is also printed at I Joint Appendix, p. 151, and II Joint Appendix, p. 811, Washington Public Power Supply System v. FPC, 358 F. 2d 840 (D.C. Cir. 1966).

As described in the application, the proposed project would consist of two water-power developments designated as Mountain Sheep and Pleasant Valley and described respectively as:

(a) *Mountain Sheep* consisting of a concrete arch dam with a top elevation of approximately 1,108 feet (m.s.l.) located at river mile 192.6 in SE¼ Sec. 30, T. 29 N., R. 3 W., B. M., Idaho, and SE¼ Sec. 18, T. 4 N., R. 49 E., W. M., Oregon, creating a reservoir extending about 20.6 miles to the Pleasant Valley site; a powerhouse with provision for installation of 250,000 kilowatts of generating capacity and appurtenant facilities, and

(b) *Pleasant Valley* consisting of a concrete arch dam with a top elevation of approximately 1,475 feet (m.s.l.) located at river mile 213.2 in NW¼ Sec. 29, T. 27 N., R. 1 W., B. M., Idaho, and SW¼ Sec. 17, T. 2 N., R. 51 E., W. M., Oregon, creating a reservoir extending about 34 miles to Hells Canyon dam site containing about 850,000 acre-feet of storage capacity of which about 300,000 acre-feet will be usable for power, flood control, and other beneficial uses; a powerhouse with provision for installation of 600,000 kilowatts of generating capacity and appurtenant facilities.

The energy generated by the proposed project is expected to be distributed through the transmission facilities of the Northwest Power Pool to the four companies (The Montana Power Company, The Washington Water Power Company, Pacific Power & Light Company, and Portland General Electric Company) controlling the applicant company and then distributed through their separate systems for domestic, commercial and industrial purposes.

In reporting on the application, the Department of the Army has advised, among other things, that studies currently under review by the Departments of the Interior and the Army indicate that about 500,000 acre-feet of power drawdown and flood control storage would be desirable in the Pleasant Valley Reservoir if the High Hells Canyon

project is not constructed, and that in view of the importance of obtaining flood control storage in the development of the water resources of the Columbia River and tributaries, the Corps of Engineers desires further opportunity to review this phase of the applicant's plans when more information becomes available. The Department of the Army offers no objection to the granting of a preliminary permit to the applicant.

The Chief, Forest Service, acting for the Secretary of Agriculture, who has supervision over the Wallowa, Weiser and Nez Perce National Forests, has reported favorably on the application as hereinafter provided.

An Assistant Secretary of the Interior, in reporting on the application, has pointed out, among other things, that:

(a) According to the U. S. Fish and Wildlife Service, the two proposed dams would impair passage of valuable runs of anadromous fish which spawn in the Snake River and its tributaries above the Salmon and Imnaha Rivers, and the Service estimates that the total cost of studies by Federal and State agencies needed to determine the extent of the fisheries problem and feasible means for mitigating losses would be not more than $250,000. Accordingly, the Assistant Secretary recommends that in the interest of conservation of fish and wildlife resources, any preliminary permit issued should include a provision substantially as hereinafter provided;

(b) The National Park Service believes that the impounded waters of the two dams will have definite recreational potentialities, and requests that any permit issued should include a provision substantially as hereinafter provided;

(c) The Bureau of Mines has reported that the area of the proposed project may be mineralized to a considerable extent, and recommends that any permit issued should in-

clude a provision substantially as hereinafter provided; and that

(d) Interests of other agencies of the Department of the Interior will not be adversely affected by the issuance of a preliminary permit for the proposed project.

The Governor of Idaho and State of Idaho Reclamation Engineer, respectively, have reported favorably on the application. The Idaho Department of Fish and Game has reported on the application, as have the Oregon State Game Commission, the Fish Commission of Oregon, and the Department of Fisheries and the Department of Game of the State of Washington.

Federal plans for development of the two power sites as initially investigated by the Corps of Engineers and the Bureau of Reclamation indicate that the proposed project has engineering feasibility and would provide benefits from power, flood control, navigation and other interests. Since the two developments would be located immediately downstream from the Hells Canyon site, the costs, operation, and characteristics of certain features of the two dams will depend upon the ultimate development of the Snake River at and above the Hells Canyon site. Consequently, the permit should contain a condition requiring cooperative studies with the Corps of Engineers and the Bureau of Reclamation in order to determine the best plan of development.

The permit issued herein does not authorize construction of the proposed project—being for the sole purpose of maintaining priority of application for a license for the project under the terms of the Federal Power Act.

The Commission *finds:*

(1) The applicant is a corporation organized under the laws of the State of Oregon, and is qualified to do business in the States of Washington and Idaho.

(2) The project will be located on navigable waters of the United States and will occupy lands of the United States within the Wallowa, Weiser and Nez Perce National Forests.

(3) Public notice of the application has been given as required by the Federal Power Act. No conflicting application is before the Commission. However, an informal protest against the application was received from Northwest Public Power Association, Inc.

(4) The proposed project would not affect any Government dam, and no reason is apparent at this time for its development by the United States.

The Commission *orders:*

(A) This preliminary permit is issued to Pacific Northwest Power Company, of Portland, Oregon (hereinafter referred to as the Permittee), for a period of three years, effective as of April 1, 1955, for the sole purpose of maintaining priority of application for a license for Project No. 2173 to be located upon navigable waters of the United States and affecting lands of the United States, subject to the terms and conditions of the Act, which is incorporated by reference as a part of this permit, and subject to such rules and regulations as the Commission has issued or prescribed under the provisions of the Act.

(B) This permit is also subject to the terms and conditions set forth in Form P-1, entitled "Terms and Conditions of Preliminary Permit," 16 F. P. C. 1303,† which terms and conditions (described as Articles 1 through 8) are attached hereto and made a part hereof; and subject to the following special conditions set forth herein as additional articles:

Article 9. The Permittee shall submit at the close of each sixth-month period from the effective date of the preliminary permit to the Commission's Regional Engi-

† Articles 1 through 8 of Form P-1 are printed in Appendix F, p. 159a, *infra.*

neer, San Francisco, California, or to such other officer as the Commission may designate, accurate statements of the work accomplished during the period and of the work contemplated under the preliminary permit for the ensuing period.

Article 10. The Permittee shall cooperate with the U. S. Forest Service during the period of this permit to develop a plan for alleviation of damage to and achieving maximum utilization of National Forest resources insofar as affected by the proposed project.

Article 11. The Permittee shall, during the period of this permit, cooperate with the U. S. Fish and Wildlife Service, the Fish Commission of Oregon, the Oregon State Game Commission, and the Idaho Department of Fish and Game in formulating mitigation measures for inclusion in the project in the interest of fish and wildlife conservation.

Article 12. The Permittee shall, during the period of this permit, negotiate with the U. S. Fish and Wildlife Service, the Fish Commission of Oregon, the Oregon State Game Commission, and the Idaho Department of Fish and Game for the performance of the necessary studies in the interest of conservation of fish and wildlife resources and payment of the costs thereof; *Provided, however,* That in the event the Permittee and the agencies named herein fail to reach an agreement as contemplated herein, the Commission may, after notice and opportunity for hearing, determine the scope of the studies and the amount the Permittee shall pay to reimburse the agencies involved for such studies.

Article 13. The Permittee shall, during the period of this permit, cooperate with the Department of Public Lands of the State of Idaho, the State Parks Department of the Oregon State Highway Commission, the National Park Service, and the U. S. Forest Service regarding the recreational phases of the project.

Article 14. The Permittee shall, during the period of this permit, cooperate with the Bureau of Mines in regard to a

study of the mineral resource possibilities of the area affected.

Article 15. The Permittee shall, during the period of this permit, cooperate with the U. S. Corps of Engineers and the Bureau of Reclamation with the object of determining a plan of development for the two sites best adapted to a comprehensive plan of development of the water resources of the Snake River.

(C). This order shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313 (a) of the Act, and failure to file such an application shall constitute acceptance of this preliminary permit. In acknowledgment of the acceptance of this preliminary permit, it shall be signed for the Permittee and returned to the Commission within 60 days from the date of issuance of this order.

APPENDIX F

FEDERAL POWER COMMISSION

Form P-1

Terms and Conditions of Preliminary Permit †

Article 1. The permittee shall make such engineering and other investigations, secure such data, and perform such acts as are necessary in order to submit to the Commission as part of its application for license such maps, plans, specifications, estimate of cost, and other information for a full understanding of the proposed project as is required by the Commission's rules and regulations; and shall supply for the use of the Commission copies of engineering and geologic reports and results of tests and analyses, and any other information secured in connection

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† 16 FPC 1303 (1956). Form P-1 is also printed at I Joint Appendix, p. 159, Washington Public Power Supply System v. F.P.C., 358 F. 2d 840 (D.C. Cir. 1966).

with such investigations, examinations, and surveys when and as they are submitted to or completed by the permittee. In carrying out the requirements of this article the permittee shall:

A. Install as soon as practicable and thereafter maintain such stream gages and stream-gaging stations as the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region shall determine necessary and best adapted for the purpose of determining the stage and flow of the stream or streams from which water will be diverted, and shall provide for required readings of such gages and for the adequate rating of such stream-gaging stations. The exact location, design, and time of installation of gages and stations, the ratings of such stations, and the determination of the flow thereat shall be made under the supervision of or in cooperation with the District Engineer of the Geological Survey having charge of stream-gaging operation in the region of said project; and the permittee shall advance the said Geological Survey the amount of funds estimated to be necessary for such cooperation and supervision for such periods as may be mutually agreed upon. The permittee shall keep accurate and sufficient record of the foregoing determinations to the satisfaction of the Commission, shall make return of such records at the time of filing application for license and at such other times as the Commission may require, and in such form as the Commission may prescribe.

B. Sink such test pits or make such borings or other foundation explorations and make such geologic studies and tests on foundations and fill material as will make available sufficient information relating to character of foundations and materials for the project structures to permit of the designing of the structures in accordance with good engineering practice and the checking of their safety, adequacy, and desirability in the development of the resources involved.

C. Begin the required investigations within sixty days after acceptance of the permit, and thereafter prosecute such investigations in such manner and at such rate as in the judgment of the Commission will insure the completion of all necessary investigations within the period of the permit.

Article 2. A license will be issued for the proposed project only if in the judgment of the Commission said project will be best adapted to a comprehensive plan for the improvement and utilization of the site for purposes of navigation, of water-power development, and for other beneficial public uses, including recreational purposes. In reaching a decision thereon, the Commission will consider, among other things:

A. Whether the maps, plans, and specifications are such:

(1) That full, practicable utilization will be made of the water, storage possibilities, and the head at the site to be developed;

(2) That the structures will be safe and in accordance with good engineering practice; and

(3) That all unnecessary energy losses, whether in hydraulic works or in mechanical or electrical equipment, will be avoided.

B. Whether in relation to existing or probable future projects upon the same or adjacent streams, the fullest practicable utilization of the water, storage possibilities, and head available will be made possible.

C. Whether said project will be in general accord with the most beneficial utilization of the water for navigation, water power, irrigation, or other beneficial public uses, and for aiding flood control reclamation, and similar developments.

D. Whether proper provision is made for present or future electrical inter-connection with other projects or

systems in order to take advantage of diversity of stream-flow and of power demands.

E. Whether the use to which the power will be devoted is, in general, in accord with the needs of the community and of the public welfare.

F. Whether the applicant is financially able to carry out the development.

G. Whether the construction, maintenance, and operation of the proposed project works will interfere or be inconsistent with the purpose for which any reservation of lands of the United States was created or acquired.

Article 3. The priority granted under the permit will be lost if the permittee fails to fulfill the requirements of the permit, if the permit is cancelled by order of the Commission, or if in course of consideration by the Commission of said application for license, the permittee shall not on or before the date of expiration of the permit, or such later date as may be fixed by the Commission:

A. File data required by the Commission in addition to that contained in or furnished with said applicaton; or

B. Present satisfactory evidence of ability to carry out the plan as set forth in said application, or as required to be modified by the Commission; or

C. Accept the conditions of the proposed license; or

D. Modify the plans as may be required by the Commission if the project adopted as disclosed in said plans is not such as in the judgment of the Commission, based upon the consideration set forth in article 2 hereof, will be best adapted to a comprehensive plan for the improvement and utilization of the site for the purposes of navigation, of water-power development, and for other beneficial public uses, including recreational purposes.

Article 4. The permittee shall keep accurate and dependable records of all expenditures made for the purposes

authorized by the permit, together with all vouchers and other supporting data relating to such expenditures, which records shall be retained by the permittee.

Article 5. If license is issued for said proposed project it shall be subject to the pertinent provisions of the act, to the rules and regulations of the Commission in effect at the time of issuance, and may contain such special conditions and requirements not inconsistent with the act as the Commission may require.

Article 6. The permit confers no authority upon the permittee to undertake construction of the project, or any part thereof, or to occupy or use lands or other property of the United States for the purposes of construction unless specific permission is given by the Commission for such occupancy or use; and neither the granting of such authority nor the performance of construction work whether with or without such authority shall be deemed to have created any equities or to have established any rights with respect to issuance of license, beyond what would have been created or established had such authority not been given or such work not been performed.

Article 7. In order to maintain the priority of application granted by the permit, the permittee shall on or before the expiration date of the permit file with the Commission or its designated agent, in conformity with the Commission's rules and regulations then in effect, an application for license for the proposed project.

Article 8. The permit is not transferable and may be canceled by order of the Commission upon failure of the permittee in good faith to begin or diligently to prosecute the investigations, examinations, and surveys contemplated under the permit, or to comply with any other conditions therein, or for any other good cause shown after notice and opportunity for hearing.

STATUTES AND REGULATIONS

APPENDIX G

Relevant Sections of the Federal Water Power Act, Approved June 10, 1920 (41 Stat. 1063, as amended, 16 U.S.C. §§ 791-823)

Sec. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit:

* * *

(7) "municipality" means a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power;

* * *

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project;

* * *

[41 Stat. 1063, as amended, 16 U.S.C. § 796 (1964)]

Sec. 4. The Commission is hereby authorized and empowered—

* * *

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the

Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however,* That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

* * *

[41 Stat. 1065, as amended, 16 U.S.C. § 797 (1964)]

Sec. 5. Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the

conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing. [41 Stat. 1067, as amended, 16 U.S.C. § 798 (1964)]

* * *

Sec. 7. (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development. [41 Stat. 1067, as amended, 16 U.S.C. § 800 (1964)]

* * *

Sec. 9. That each applicant for a license hereunder shall submit to the commission—

(a) Such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project. Such maps, plans, and specifications when approved by the commission shall be made a part of the license; and thereafter no change shall be made in said maps, plans, or specifications until such changes shall have been approved and made a part of such license by the commission.

(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act.

(c) Such additional information as the commission may require. [41 Stat. 1068, as amended, 16 U.S.C. § 802 (1964)]

Sec. 10. All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

• • •

[41 Stat. 1068, as amended, 16 U.S.C. § 803 (1964)]

Sec. 24. Any lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located.

* * *

[41 Stat. 1075, as amended, 16 U.S.C. § 818 (1964)]

APPENDIX H

Regulations Under the Federal Power Act (Title 18, Code of Federal Regulations) as of March 31, 1964

APPLICATION FOR LICENSE; GENERAL PROVISIONS

18 C.F.R. § 4.30 Who may file.

An application for license may be filed by any citizen, association of citizens, corporation, State, or municipality desirous of obtaining a license pursuant to the act: *Provided, however,* That if a preliminary permit has been issued, no action on applications by others than the permittee covering in whole or in part the same reach of stream or streams shall be taken that might infringe on the rights of the permittee under sections 5 and 7 of the Federal Power Act.

18 C.F.R. § 4.31 Acceptance for filing or rejection of applications.

When an application which conforms to the requirements of § 1.15 of this chapter is received, it will be given a filing number, notice of receipt thereof and filing number given

thereto will be furnished applicant, and notices will be given in accordance with the requirements of section 4 of the act (49 Stat. 839; 16 U.S.C. 797), § 1.37 of this chapter, and the Wildlife Resources Act of 1946 (60 Stat. 1080). Notice will also be given to the appropriate office of the Department of the Interior as to the public lands affected, if any, so that withdrawals from entry may be recorded, unless such action has been taken in connection with a preliminary permit. An application may be acceptable for filing for processing prior to final Commission action thereon, provided it contains the information required under § 4.40(a), (b), (c), (d), (e), (f), and (h), together with Exhibits A, B, E, G, J, K, L, M, and O, required under § 4.41. Such application may include as Exhibit K, a project area map with such information with respect to lands affected as is readily available without a detailed survey, and as Exhibit L, the tentative design of the project works proposed. An application which fails to meet these requirements will be rejected by the Secretary as provided by § 1.14 of this chapter. However, the applicant may be required to furnish the balance of the information required under §§ 4.40 and 4.41 at such time as the Secretary directs and failure to furnish same will constitute grounds for rejection of the application by the Secretary as provided by § 1.14 of this chapter. The Commission may require as a condition of license that the licensee furnish additional or revised exhibits by a specified time and failure to furnish such information within the time specified or an extension thereof granted by the Commission shall constitute a violation of the license and cause for action under section 26 of the Federal Power Act. In case any information, documents or exhibits required to be filed with an application are already on file with the Commission, in current form and substance, the same may be incorporated in the application by reference.

18 C.F.R. § 4.32 Hearing on application.

A hearing upon an application may be ordered by the Commission, in its discretion, either upon its own motion or upon the motion of any party in interest. The hearing shall be limited to the issues specified by order or orders of the Commission.

APPLICATION FOR LICENSE FOR PROPOSED MAJOR PROJECT OR MINOR PART THEREOF

18 C.F.R. § 4.40 Contents.

Each application for license for a complete project of more than 2,000 horsepower installed capacity, to be constructed, or for a minor part of such project shall be verified, shall conform to § 131.2 of this chapter, and shall set forth in appropriate detail the following information in the order indicated. Unless otherwise specified, the original and ten conformed copies of the application and all accompanying documents shall be submitted with one additional conformed copy for each interested State Commission.

* * *

(e) A concise general description of the project and the principal project works, including dams, reservoirs, water conduits, power houses, substations, switch yards, and transmission lines, in such detail as may be applicable.

(f) The location of the project, the region of its location designated by adjacent cities and towns, the name of the stream on which the proposed project will be located, and a statement of the extent to which commerce is carried thereon.

(g) The lands and reservations of the United States which will be affected by the proposed project.

(h) A description of the proposed initial and ultimate schemes of development including installed capacities contemplated in each scheme.

• • •

18 C.F.R. § 4.41 Required exhibits.

There shall be filed as part of the application for license the following exhibits: *Provided,* That any exhibit not incorporated as a part of the application shall be certified in conformity with § 131.4 of this chapter:

• • •

Exhibit H. Statement of the proposed operation of the project works during times of low, normal and flood flows of the stream, including a statement of the minimum flow proposed to be released during periods of low water and to the extent possible full exposition of any proposed use of the project for the conservation and utilization in the public interest of the available water resources for the purposes of power, navigation, irrigation, reclamation, flood control, recreation, wildlife, and municipal water supply. Statement as to whether in relation to existing and proposed future projects in the same or related watersheds, the fullest practicable utilization of the water, storage possibilities, and head available will be made possible. Furnish operating rule for reservoirs with draw-down and usable storage, state criteria for determining spillway capacity.

Exhibit I. Estimate of the dependable capacity and average annual energy output to be generated by the project (dependable capacity for purposes of this section is equal to the amount of capacity from an alternative additional source which would be required to meet the load during the critical flow period for the system if the proposed hydro-project were not constructed). Specify the period of critical stream flow used in determining the dependable capacity and describe the load into which the

power generated by the project will be utilized. Furnish the following engineering data: A flow duration curve indicating the period of record and gaging stations used in deriving this curve, a tailwater rating curve, a curve showing estimated plant capability versus head, and an outline of plan for future proposed hydro-projects on the stream involved and their approximate location and ultimate installed capacity. When pertinent, state assumptions used for evaporation, leakage, and head losses.

Exhibit J. General map covering the entire project area, showing on a single sheet and to an appropriate scale the location of the following:

(1) Principal structures and other important features of the project, including such roads, railways, tramways, and bridges as it is proposed shall become part of the project works and be placed under the license.

(2) All transmission lines, substations, switchyards, and telephone lines, which it is proposed shall become a part of the project works and be placed under license, as well as general layout of the transmission system, if any, with which the project may be connected, indicating prominently by appropriate symbol the portion or portions of the transmission lines or system covered by application for license.

(3) State and county lines, reservations of the United States, towns, streams, stream gaging stations, railroads, power plants, irrigation systems and other features in the vicinity of the proposed development, information concerning which will aid in arriving at a general comprehension of the project.

(4) Reference to the detail map (Exhibit K) indicating by outline the portion shown on each sheet.

(5) If all features cannot be shown with sufficient distinctness on one sheet, two general maps may be furnished, one for the power plant and appurtenant works, and one

for the transmission system. (See specifications for drawings § 4.42.)

Exhibit K. Detail map covering entire project area. Scale shall be such as to show clearly, but without unnecessary multiplicity of sheets, the essential details of surveys and of notes as to ownership or right of occupancy of lands within the project area. In general, a scale of approximately 400 feet to the inch is appropriate for features containing a relatively large amount of detail, and scales of 1,000 or 2,000 feet to the inch where there is little detail, as is frequently the case with respect to transmission and telephone lines, roads, and railways. Elevations shall be tied to Government bench marks whenever available, and shall be referred to mean sea level except that in the case of projects in navigable waters having a datum accepted for local use by the Office of the Chief of Engineers, Department of the Army, such local datum shall be used. If more than one sheet is used the sheets shall be numbered consecutively, and each shall bear a small diagram showing the entire map and indicating the portions shown on each sheet. Several sections of a conduit, transmission line, telephone line, road, railway, etc., may be shown upon a single sheet, each so placed or limited as to avoid crowding or confusion. Except to the extent and in such particulars as the requirements may be expressly waived or modified by the Commission the detail map to be filed as this exhibit shall conform to the specifications for drawings, § 4.42, and the following requirements:

(1) It shall show the project area and the project boundary.

* * *

(2) The location shall be accurately shown of all project works, such as—

(i) Dams.

(ii) Reservoirs. Show the flow lines for maximum and minimum water levels and for elevation of spillway crest,

and give tables or diagrams of areas and capacities for maximum and minimum water levels and for each contour line.

(iii) Water conduits. Show center line, grade, and elevation of bottom at each change of grade, and designate lengths of each type of conduit, i.e., flume, ditch tunnel, pipe, etc.

(iv) Powerhouses, substations, and switchyards.

(v) Transmission lines and appurtenances, telephone lines, roads, railways, trails, tramways and bridges.

(vi) Navigation structures.

(vii) Channel approaches to navigation structures. Indicate elevation of bottom for distance of not less than 1,000 feet above and below the structures.

(3) Show contour lines with contour intervals of not more than 10 feet for the entire project area, except such portions as will be occupied only by such project works as are enumerated in (2)(v), or as will be included in reservoirs below the minimum elevation to which the water may be drawn down. Profiles of tunnel lines may be substituted for contours along such lines. (See specifications for drawings in § 4.42.)

Exhibit L. General design drawings showing plans, elevations, and sections of all principal structures and appurtenant works or other features of the project. These drawings shall be in sufficient detail and shall be accompanied by sufficient information relating to controlling factors (such as character of foundations and explorations thereof, materials and types of construction, important elevations, gradation of filter and riprap material, design and ultimate strengths for concrete and steel, stress and/or stability analysis for important structures, water levels,

spillway rating curves, etc.) to enable the Commission to have a full understanding of the project and to check safety, adequacy, and desirability in the development of the resources involved.

Scales are not specified, but it is desired that they be no larger than necessary to show clearly the information required. Drawings should be simple. Details are desired only as necessary to show features of importance in determining safety, adequacy, and suitability of design. Working drawings are not desired as part of application, but should be prepared for purposes of construction and retained as a record of the work when completed. In this exhibit shall be included—

(1) Dams and appurtenances, such as spillways, fishways, outlet works, etc.

(2) Navigation structures and approaches thereto, including locks, lock gates, operating machinery, etc.

(3) Conduits including forebays, intake works, surge tanks, and other pressure relief devices, etc.

(4) Powerhouses and substations (see specifications as in § 4.42).

Exhibit M. General descriptions of mechanical, electrical, and transmission equipment and their appurtenances in sufficient detail to enable the Commission to have a full understanding of the project, to determine the installed capacity in horsepower and kilowatts, and to determine the safety of the project works and their adequacy and suitability for the development and utilization of the resources involved, also proposed name plate ratings for generators and turbines, and when required by the Commission or the Secretary performance data for generators and turbines and general specifications of mechanical, electrical, and transmission equipment.

Exhibit N. Estimate of the cost of developing the project including the following items:

Land and land rights;

Power plant structures and improvements;

Reservoirs, dams and waterways;

Water wheels, turbines and generators;

Accessory electric equipment;

Miscellaneous power plant equipment;

Roads, railroads, and bridges (permanent facilities); and

Transmission facilities.

* * *

Exhibit O. Detailed statement of the time desired for beginning and completing construction of the projects works. If the ultimate development is to be completed and put into operation in two or more parts, the time desired for beginning and completing the construction of each part shall be given.

* * *

APPLICATION FOR PRELIMINARY PERMIT AND AMENDMENTS THEREOF.

* * *

18 C.F.R. § 4.80 Who may file.

Any citizen, association of citizens, corporation, State, or municipality desirous of obtaining a license pursuant to the act for a project of more than 2,000 horsepower installed capacity may make application for the issuance of a preliminary permit for the purpose of enabling applicant to secure the data and perform the acts required by law for filing an application for the issuance of a license.

18 C.F.R. § 4.81 Acceptance for filing or rejection of applications.

When an application which conforms to the requirements of § 1.15 of this chapter is received, it will be given a filing number; receipt thereof and filing number given thereto will be furnished applicant, and notices will be given in accordance with the requirements of section 4 of the act (49 Stat. 830; 16 U.S.C. 797) and § 1.37 of this chapter. Notice will also be given to the appropriate office of the Department of the Interior as to the public lands affected, if any, so that withdrawals from entry may be recorded. An application may be acceptable for filing for processing prior to final Commission action thereon, provided it contains the information required under § 4.82(a), (b), (c), (d), (e), (f), (g), and (k), together with Exhibits A, B, C, D, H and I. An application which fails to meet these requirements will be rejected by the Secretary as provided by § 1.14 of this chapter. However, the applicant may be required to furnish the balance of the information required under this section and § 4.82 at such time as the Secretary directs, and failure to furnish same will constitute grounds for rejection of the application by the Secretary as provided by § 1.14 of this chapter. In case any information, documents or exhibits required to be filed with an application are already on file with the Commission, in current form and substance, the same may be incorporated in the application by reference.

18 C.F.R. § 4.82 Contents of application.

Each application for preliminary permit shall be submitted as prescribed in § 131.10 of this chapter, and shall set forth in appropriate detail the following information in the order indicated. Unless otherwise specified, the original and ten conformed copies of the application and all accompanying documents shall be submitted, with one additional conformed copy for each interested State Commission.

* * *

(e) The location of the project, the region of its location designated by adjacent cities and towns, the name of the stream on which the proposed project will be located, and a statement of the extent to which commerce is carried thereon.

(f) The lands of the United States which will be affected by the proposed project.

(g) A general description of the project and the proposed scheme of development including an estimate of the proposed installed capacity, and the average annual output.

• • •

(k) (Required exhibits.) There shall be filed as part of the application the following exhibits: *Provided,* That any exhibit not incorporated as a part of the application shall be certified in conformity with § 131.4 of this chapter.

• • •

Exhibit H. A general map showing the nature of the proposed project, its principal features and their location, and the location of the project as a whole with reference to some well-known town or stream. On this map shall be placed a line indicating the approximate project boundary of the area to be occupied by the principal project works, such as, dams, reservoirs, forebays, waterways, and powerhouses, but excluding transmission lines, and where necessary in order to determine the location of such structures on the ground, there shall be shown on the map their relative positions with respect to permanent monuments or objects that can be readily recognized from descriptions thereof noted on the map. (See specifications for drawings, § 4.42.)

Exhibit I. This exhibit shall be submitted only if public lands or reservations are affected and shall be a map of the proposed project showing principal project works in a manner similar to the preceding exhibit H, except that

such map shall show and shall be on a scale to present effectively a tentative project boundary which shall be the line enclosing all quarter-quarter sections, lots, and other smallest legal subdivisions of public-land survey which may be occupied or used in whole or in part by the project. It shall also show the status of lands, indicating separately lands patented, lands entered or otherwise embraced in any unperfected claim under the public-land laws, unreserved public lands, and lands of each and every reservation affected. (See specifications for drawings, § 4.42.) If desired a single map may be submitted for exhibits H and I, provided it shows all the information required for both.

18 C.F.R. § 4.83 Hearing on application.

A hearing upon an application may be ordered by the Commission, in its discretion, either upon its own motion or upon the motion of any party in interest. The hearing shall be limited to the issues specified by order or orders of the Commission.

18 C.F.R. § 4.84 Amendments.

Applications for amendments of preliminary permits shall follow the form prescribed for original applications, as far as applicable. If an application for an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application. Unless otherwise specified, an original and ten conformed copies of the application and all accompanying documents shall be submitted, with one additional copy for each interested State Commission.